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In the

Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC.
Petitioner

vs.

OSCAR R. EWING, Administrator, and
J. DONALD KINGSLEY, Acting Administrator,
FEDERAL SECURITY AGENCY, FOOD and DRUG
ADMINISTRATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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Dated at Seattle, Washington, August 17, 1949.

THE ARGUS PRESS, SEATTLE

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WILLAPOINT OYSTERS, INC., *Petitioner*, vs. OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION, *Respondents.*	No. .....

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

Your Petitioner, Willapoint Oysters, Inc., prays that a writ of certiorari issue to review a final decree of the United States Court of Appeals for the Ninth Circuit, in the above entitled cause. The opinion and decree were entered on April 29, 1949, and a petition for rehearing, seasonably filed, was denied on June 3, 1949. (R. Vol. XI 1, 33; Vol. XII 1, 53).

I. SHORT SUMMARY OF MATTER INVOLVED

The decree of the Court of Appeals reversed in part, and affirmed in part, in accordance with its opinion, two certain final orders of the Administrator and of his deputy, the Acting Administrator, Federal Security agency, which had prescribed a *new* "definition and standard of *identity*"[1] and a *new* "standard of *fill*" for canned oysters, under §401 of the Federal Food, Drug and Cosmetic Act, 21 U.S.C.A. (Supp.) §341.

The two final orders directed two basic changes in lawful practices adhered to by Petitioner for more than twenty years under standards promulgated by Respondents and their predecessors, as follows:

(a) Change Required in Name—Standard of Identity. The orders would require petitioner (and other Western canners of oysters) to stop a long continued and lawful use on their can labels of the generic description

"OYSTERS"

and would require thereafter that such labels be changed to

"PACIFIC OYSTERS"

At the same time the orders would grant to all Southern canners of oysters, henceforth, the exclusive right to continue the use on their can labels of the generic description

"OYSTERS"

without any similar restrictive geographical limitation of source or species.

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[1]Emphasis supplied herein unless otherwise noted.

(b) Change Required in Drained Weight—Standard of Fill.

The orders would compel petitioner (and other Western canners of oysters) to *increase* the historic cut-out or drained weight[2] of oyster meats from an existing 5-ounce standard for large Western oysters to a new requirement of 6½ ounces (or a 30% *increase* per can).

At the same time the orders would empower all Southern canners of oysters to *reduce* the drained or cut out weight of oyster meats for their small Southern oysters from an existing 7½-ounce standard, heretofore found reasonable by the Administrator for the small Southern oysters, to a new requirement of 6½ ounces (or a 13% *reduction* per can).

The avowed purpose of these two orders was to attain "parity" in canned packs of two entirely different species of oysters, produced under different conditions, and purchased by consumers for basically different uses. But, although "parity" was the avowed purpose, the orders compelled *disparity* in name and so-called "parity" in fill was only accomplished by requiring a gross *disparity* in the weight of oyster meat necessarily put into the can by the two different branches of the industry.

Petitioner, after exhausting administrative rem-

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[2]"Drained weight" is the weight of canned oyster meats remaining in the can after the liquid in which they are immersed in a sealed can and subsequently cooked has been drained away.

edies, sought judicial review, contending that the orders imposed unlawful and discriminatory detriments to petitioner (and other Western canners of oysters) and granted unlawful and preferential benefits to all Southern packers, and were made in violation of the Federal Food, Drug and Cosmetic Act and of the Administrative Procedure Act.

II. SUMMARY OF DECISION OF COURT OF APPEALS

The Court of Appeals held that §401 of the Federal Food, Drug and Cosmetic Act (21 U.S.C.A. §341) limited the power of the Administrator to prescribe, after hearing and upon the record, only "*reasonable*" standards of identity, and "*reasonable*" standards of fill.

It concluded that the "Standard of *Identity*" prescribed by the orders was:

> "extremely *arbitrary, capricious* and *unreasonable* when examined in the light and against the background of the order's entire effect," (R. Vol. XI, p. 31).

and

> "*outside the bounds of reason and fairness* * * * (and) * * * *manifestly unfair* to that portion of the industry discriminated against, and to that extent we regard the requirement as *arbitrary, capricious* and an *abuse of discretion.*" (R. Vol. XI, p. 32).

Accordingly the Court set aside the requirements as to "Standard of Identity" (R. Vol. XI, p. 32). To such extent, Petitioner prevailed, and does not herein seek certiorari.

But the Court concluded that the portion of the orders which prescribed a new "Standard of Fill" was

reasonable, supported by substantial evidence, and lawfully made; and did not violate constitutional rights or procedural due process, or other requirements of law; all as alleged by Petitioner (R. Vol. XI, pp. 8-30). It is this portion of the opinion and decree that petitioner seeks to review by certiorari.

III. JURISDICTION

Jurisdiction to review is specifically conferred on this Court by §701 (f) (4) of the Federal Food, Drug and Cosmetic Act, 21 USCA §371(f) (4). It provides that such judgments of the Court of Appeals are subject to review upon certiorari or certification under §239 and §240 of the Judicial Code, as amended [formerly 28 U.S.C.A., §§346, 347; now Title 28, United States Code (1948) §1254].

IV. QUESTIONS PRESENTED

1. Did the Court of Appeals err in failing to find that the "*standard of fill*" portion of the two final orders is not in accordance with law because (a) made without observance of procedure required by law; (b) not supported by substantial and lawful evidence; (c) unreasonable and in excess of statutory jurisdiction; (d) arbitrary, capricious and an abuse of discretion; and (e) contrary to constitutional right.

2. Are the facts in this case "on all fours" with the *second Morgan* case, *Morgan v. United States*, 304 U.S. 1, 22, (1938), in which this Court held that a parallel order was void for want of "fair procedure" because the crucial findings had been prepared for the respondent Secretary's signature:

> "by the active prosecutors for the Government, after an *ex parte* discussion with them and with-

out according any reasonable opportunity to the respondents to know the claims thus presented and to contest them. *This is more than an irregularity in practice; it is a vital defect.*"

3. Is "fair procedure" denied where Petitioner was forbidden to cross-examine and his offer of proof interrupted and rejected by the Presiding Officer even before completed, when Petitioner offered to show that the crucial findings on sharply controverted evidence were prepared *ex parte* for the Administrator's signature by the active prosecutor and witness for respondents.

4. *Does the class of "permissible assistants"* who may assist the Administrator by preparing findings for his signature and who may "resolve conflicts in the evidence" as to which witnesses "should be believed" *include the chief government witness who had testified in direct conflict with testimony of private citizens affected, and the* principal government *attorney who espoused his cause;* or in such case have they so "*buried themselves in one side of the controversy*" that they are necessarily excluded from the class of "permissible assistants" (within the spirit and meaning of this Court's decision in the second *Morgan* case, *supra*) who can render such aid in "*sifting the evidence*" and preparing the findings "*with the dispassionate judgment which Anglo-American tradition demands of officials who decide questions*"?

5. Where a supplemental proceeding has been had pursuant to court remand, is it fatally defective for the Administrator to consider only the first record

(but not the second) and for his Deputy, as Acting Administrator, to consider only the second record (but not the first) when, as the Court of Appeals said, it was necessary that the evidence be:

> "examined in the light and against the background of the order's entire effect" (R. Vol. XI, 31).

6. Or, is such action void for want of "fair procedure" under the rule of this court in the *first Morgan* case, *Morgan v. United States*, 298 U.S. 468, 481 (1936) which held that the "basic rudiments of fair play" are not satisfied when

> "one official * * * examine(s) evidence and another official who has not considered the evidence * * * make(s) the findings and order"?

V. REASONS FOR ALLOWANCE OF WRIT

The reasons relied upon by Petitioner for allowance of a writ of certiorari, and upon which Petitioner believes this petition should be granted are that the opinion and final decree of the Court of Appeals:

1. Decides a federal question involving "fair procedure" and Due Process of Law by an important federal administrative agency in a way that appears to conflict with applicable decisions of this Court, particularly the *first* and *second Morgan* cases, *supra*, and so far departs from the accepted and usual course of judicial proceedings, and so far sanctions such a departure by an administrative agency, as to call for an exercise of this court's power of supervision.

2. Concludes this controversy in a manner that ap-

pears to conflict with a decision of the Court of Appeals for the Third Circuit, and with another decision of the Court of Appeals for the Sixth Circuit, and a third decision of the Court of Appeals for the District of Columbia, and with still a fourth decision of the Court of Appeals for the Fifth Circuit.

3. Raises important questions in the administration of the Federal Food, Drug, and Cosmetic Act, and of the lawfulness of administrative action under the Administrative Procedure Act, which have not been but ought to be settled by this Court.

VI. PRAYER

Wherefore, your petitioner respectfully prays that this petition be granted and that a Writ of Certiorari be issued directed to the United States Court of Appeals for the Ninth Circuit.

Dated at Seattle, Washington, August 17, 1949.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I. OPINIONS BELOW

The First Final Order of the Administrator, dated March 10, 1948, is reported in the Federal Register, March 13, 1948, 13 F.R. 1337-9 (R. Vol. II, pp. 40-45c).

The Second Final Order of the Acting Administrator, dated August 3, 1948, is reported in the Federal Register, August 12, 1948, 13 F.R. 4653-4 (R. Vol. IX, pp. 1-7).[3]

The "slip" opinion and decree of the Court of Appeals dated April 29, 1949, constitutes Volume XI of the Record. The opinion is reported in 174 F.(2d) 676 (adv. sh.).[4]

II. STATUTES INVOLVED

The statutes involved are the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, c. 576; 21 U.S.C.A. §301, *et seq.*; and the Administrative Procedure Act, 60 Stat. 243, c. 324; 5 U.S.C.A. (Supp.) §1001, *et seq.* Pertinent portions are set forth in *Appendix A* hereof.

III. SUMMARY STATEMENT

The ultimate question presented is the requirement of fair procedure by administrative agencies.

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[3]The two final orders are also annexed as *Appendices A* and *B* and to the First Supplemental Petition for Judicial Review filed herein (R. Vol. X, pp. 50, 59).

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[4]Also unofficially reported, C.C.H. Food, Drug and Cosmetic Law Reports ¶7119.

Nothing contained in this case attacks the *personal* integrity of the government officials involved, but Petitioner does vigorously challenge the *official* integrity and basic fairness of Respondents' method of deciding controverted matters.

Nor is this a case which fruitlessly raises the "substantial evidence" question. But it does vigorously challenge the conclusion that by denominating a proceeding as "rule-making" it is virtually immunized against attack. Petitioner respectfully submits that the opinion of the Court of Appeals sustaining these practices is not in accordance with prior decisions of this Court.

May the three-fold combination of Judge, Jury and Prosecutor become *indeed* a four-fold one to permit the witness, if a government officer, to be prosecutor and then to testify and then to cross-examine opposing witnesses and finally be Judge and Jury as to the weight and credibility of his own testimony?

May he reach conclusions, theoretical or otherwise: then give evidence in support of his pre-formed conclusions; then sit in judgment of the validity of such testimony when set opposite that of private citizens affected; and finally "sift the evidence" and prepare the findings for the Administrator's signature, when in so doing he "sifts in" his own evidence and "sifts out" that of his opponents? Does this satisfy all that this Court requires of the "substantial evidence" rule and of "fair play"?

These questions are not conjecture but are well recognized reality.

Mr. H. Thomas Austern, an eminent lawyer, specializing in Food and Drug matters, and the General Counsel of National Canners Association, points out in a scholarly article on the subject,[5] the deficiency of fairness in Respondents' procedural methods of prescribing mandatory food standards. He states:

> "* * * those who are *parties* to a controversy ultimately *participate in* its *decision and* in the *preparation of* the *findings on which* in large measure *judicial review will turn.*
>
> "* * * *the findings* proposed and ultimately made in a few standard proceedings *are unduly provocative.* In some respects *they invite discussion and warrant suggestions for improvement.*
>
> * * * * * * * * *
>
> "In the first place, *there is a tendency to write up the evidence to support* the decision *and* to *write down or disregard the evidence the other way.* * * * *This may be a form of advocacy, but it is hardly adequate findings as to the facts of record.*
>
> "* * * *Where findings* on a controversial issue *consistently* dispose of numerous industry witnesses by reciting merely that 'there is some evidence' and *invariably* sum up a government witness' testimony by a categorical statement of the fact to which he testified, *it is difficult to convince critics that the record is being evaluated without bias.*"

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[5]Austern, The Formulation of Mandatory Food Standards, 2 Food, Drug and Cosmetic Law Quarterly, 532 at 579-581 (1947).

Similarly, Mr. James M. Best, another skilled counsel in Food and Drug matters and the General Counsel of the Quaker Oats Company reaches similar conclusions.[6]

> "* * * restraint may well * * * be exercised to insure that the public hearing is conducted in such a manner as to eliminate any suspicion of unfairness. This is particularly necessary because the statutory procedure for standard-making itself possesses the indicia of unfairness. The standard is *proposed* by Departmental officials, *presented* by a Departmental attorney, *supported* by testimony of Departmental officials, and *submitted* to a Departmental hearing officer who reports his findings and conclusions back to the Departmental officials who proposed it. *The manufacturer would be naive indeed who would not have some misgivings about the effectiveness of this procedure to prevent arbitrary action.*"

If the elaborate Congressional requirements for hearings based on evidence be thus thwarted, the statute becomes a mockery and all the Administration's witness need do is plan his conclusions, patiently sit through a *pro forma* hearing, offer his own evidence in support, await a ritualistic tender by industry witnesses of opposing evidence, then prepare findings as he had originally conceived. For under the evolution of the limits on judicial review, a Court may not review the Record for the purpose of reaching different conclusions. "The judicial function is exhausted when there is found to be a rational basis for

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[6]Practical Aspects of Cereal Food Standardization, 3 Food, Drug and Cosmetic Law Quarterly, 204, 212-214. (1948)

the conclusions approved by the administrative body." *Rochester Telephone Corporation v. United States*, 307 U.S. 125, 146 (1939).

But this Court, recognizing that rule, has expressly held that the basic rudiments of fair play must also be observed. Respondents' practice challenged here violates every concept of Anglo-American fairness. *Ohio Bell Tel. Co. v. Comm.*, 301 U.S. 292, 294-5 (1937); *Edison Co. v. N.L.R.B.*, 305 U.S. 197, 229-30 (1938); *Morgan v. United States*, 298 U.S. 468, 481 (1936); *Morgan v. United States*, 304 U.S. 1 (1938).

IV. SPECIFICATION OF ERRORS TO BE URGED

Petitioner respectfully submits that the Court of Appeals erred:

In failing to find that the "*standard of fill*" portion of the two final orders is not in accordance with law because (a) made without observance of procedure required by law; (b) not supported by substantial and lawful evidence; (c) unreasonable and in excess of statutory jurisdiction; (d) arbitrary, capricious and an abuse of discretion; and (e) contrary to constitutional right.

V. STATEMENT OF THE CASE

The legal questions presented require a more detailed factual statement that is normally indicated in petitions for certiorari.

(a) Two entirely different species of oysters are canned.

Two entirely different species of oysters are commercially grown and canned (R. Vol. III, 33). As a

"shorthand" method, they are frequently termed "Southern" and "Western" oysters, respectively.[7] The biological differences in the two species go back a million years (R. Vol. III, 161-2). Both types have been cultivated and processed as "canned oysters" for many years in two different regions of this country (R. Vol. III, 156-8).

The Southern species of oysters, known biologically as *ostrea virginica*, now flourish on the Gulf Coast of the Southern states, particularly in Mississippi and Louisiana (R. Vol. III, 128-30). They are very small, fibrous and hard tissued. When canned, they are known as "canned oysters," and also variously termed locally as "Cove", "Gulf Coast", "Eastern", "Atlantic", and "Southern" oysters (R. Vol. IV, Ex. 5, pp. 1-45).

The Western species of oysters, known biologically as *ostrea gigas*, is (as its Latin name implies) of "giant" size, soft and loose-tissued. Originally grown on the Japanese Coast, they are now indigenous to the cold waters of the Pacific Northwest in Washington and Oregon (R. Vol. III, 157-8). When canned they also are known as "canned oysters" and variously termed locally as "Pacific Coast," "Japanese," "Tillamook" and "Western" oysters (R. Vol. III, 179, Vol. IV, 634, Ex. 5, pp. 1-45).

Both species are canned in various sizes of tins, of which the typical or standard size is the No. 1 can,

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[7]Neither species should be confused with fresh raw oysters familiar on the East Coast and commonly known as Blue Points, Lynnhavens, Long Islands and Chincoteagues (R. Vol. XI, 32).

having a water capacity of 10.94 ounces. It is identical in size and shape to the familiar "Campbell Soup" can. For many years, this size has been filled with canned oysters of *either* species to a drained weight of 5 ounces (R. Vol. III, 63-4).

The differing nature and size of the two different species of canned oysters is illustrated by the fact that a standard size can packed to yield the drained weight of 5 ounces of Southern oysters contains from 20 to 65 of the small Southern oysters; but the same can identically packed to yield the same 5-ounce drained weight of Western oysters contains only 4 to 8 of the giant Western oysters (R. Vol. IV, Ex. 3, Findings 12 and 13).

These comparisons are important in subsequent consideration of the extent to which additional quantities of these two different species of oysters may be placed into cans without resultant damage to their natural qualities in appearance, color, texture and shape.

(b) History of standard of fill.

In 1914, following "extended investigation", respondents' predecessor, the Department of Agriculture, promulgated an "advisory standard" fixing a "*drained weight*" of *5 ounces* of oysters in the No. 1 can.[8] This standard was reconsidered over the years

[8]Substantially identical proportions, averaging from 42 to 49 per cent of the estimated water capacity of the respective cans were required for other sizes (R. Vol. IV, Ex. 3, Findings 2 and 3).

on several occasions[9] and remained effective under Food and Drug regulations until 1944 as to Southern oysters and until the present 1948 orders as to Western oysters (R. Vol. IV, Exs. 3, 4).

In 1942, because of the war tin shortage, Southern packers who were canning both Southern oysters and shrimp voluntarily increased the drained weight of their packs of both the small Southern species of oysters and Southern shrimp from 5 ounces to 7½ ounces (R. Vol. IV, 550, 554-5) and the War Production Board, under emergency War Power regulations, and without formal hearing or findings, issued its Conservation Order No. M-81, which in effect made such increases mandatory (R. Vol. IV, 448). This 1942 Conservation Order limited the availability of tin plate and cans to certain minima requirements in many industries, including one which restricted the availability of tin for *all* species of canned oysters to packers of a drained weight fill of 7½ ounces.[10]

Compliance by Western packers of oysters would have meant a destructive fill of their larger Western oysters. Western canners did not overpack, and accordingly during the war years could not qualify to obtain tin cans. They temporarily ceased production of canned oysters, and sold only fresh oysters while Conservation Order No. M-81 was effective. This order expired after the end of the war (R. Vol. III, 204, 443).

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[9]Dunn, Food and Drug Laws (First ed. 1927, 3 vol.), Vol. 1, pp. 21-2, 39-40, 46, 103-4, 201.

[10]7 F.R. 947, 4836 and successive amendments. See 32 C.F.R. (Cum. Supp.) 9318.

Meanwhile, in 1944, two years after Conservation Order No. M-81 had become effective, the Food and Drug Administration held a hearing to establish a standard of fill under Food and Drug Laws.

The Western industry attended this 1944 hearing and protested applicability of a proposed 7½ ounce fill to its large oysters (R. Vol. III, 66). The Southern industry neither attended the hearing nor protested the fill for their small oysters (R. Vol. III, 450-1, 545). A witness for the Administrator testified in favor of such a 7½ ounce fill for small Southern oysters (R. Vol. III, 15). On the basis of his testimony, the Administrator issued in 1944 an order under §401 of the Federal Food, Drug and Cosmetic Act, which established the 7½ ounce fill as a "reasonable" standard of fill for the small *Southern* oysters only. It expressly excluded large Western oysters from its requirements (R. Vol. IV, Ex. 3, Finding 12, Conclusion 1).

Thus, in 1947, after Order M-81 had expired, the 7½ ounce drained weight was applicable for small Southern oysters, and the 5 ounce drained weight again applicable for large western oysters.

(c) Biological and processing differences in two species shown at 1947 hearing.

In July, 1947, the Administrator held a new hearing on a proposal to fix new standards for *all* species of canned oysters (R. Vols. III and IV).

The evidence showed a great dissimilarity in the biological nature and in the opening, processing, and

packing of Southern and of Western canned oysters[11] (R. Vol. IV, Ex. 3).

The small Southern oyster has a heavy shell. Prior to canning, it is subjected to intense pre-steaming to open its shell. This causes these little oysters to shrivel and dehydrate and to lose their natural body moisture, with the result that when subsequently placed in the can, immersed in a hot salt water packing solution and sealed, they "pick up" or re-absorb from ¼ to ½ ounce of the salt water and hence increase in "drained weight" while in the sealed can (R. Vol. IV, 561, Ex. 3, Findings 7-9).

But the large Western oyster has a light, thin shell. They are either opened "raw" by hand or are subjected to a very light steaming process to open their thin shells. When placed into the can, and sealed, Western oysters still retain much of their natural body fluids, which perserve their natural fresh color and appearance and their natural size and shape. But after the can is sealed and while it is subjected to a final sterilization heat, these Western oysters "bleed" or exude a portion of these body fluids into the salt water packing solution. This converts the packing medium from mere salt water into a very palatable and healthful true oyster nectar (R. Vol. III, 182-5). But it also results in a substantial decrease of from 2 to 2½ ounces in the final "drained weight" of Western oysters [R. Vol. IV, Ex. 15(a)].

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[11]The only similarity is that in the final stage of canning both species, they are placed into cans in a packing medium consisting of a hot salt water solution, which cans are then sealed and cooked in a final sterilization heat.

Thus, for any identical "drained weight" fill (of which the 5 ounce fill is illustrative) *the Southern industry "puts in"* approximately 4¾ *ounces* of its small oyster meat, which gains in the can ¼ ounce because of absorption, *to yield the 5 ounce* "drained weight". *The Western industry "puts in"* to the same size of can approximately 7½ *ounces* of its large oyster meats, or more than 50% more oyster meat, but "loses" in the can approximately 2½ ounces because of exudation into the packing medium, *to yield the same 5 ounce* "drained weight."

(d) Required increase in Western fill and decrease in Southern fill.

The First Final Order found the "interest of consumers" would be advanced by reducing the 7½ ounce fill previously found reasonable for Southern oysters to 6½ ounces, and by increasing the 5 ounce fill previously applicable to Western oysters to 6½ ounces (R. Vol. II, 40, 45, Conclusions).

(e) Lack of substantial evidence to support order.

Respondents offered no evidence in support of their proposal to add more water and less oysters to Southern packs, and *vice versa* for Western packs, but relied entirely on *a priori* testimony and conclusions that identical 6½ ounce "drained weight" fills were in the interest of consumers because it improved the economic competitive status of the two industries, regardless of differences in species, processing, and consumer preference for a natural tasting and appearing canned product.

Testimony as to the significance of certain experi-

mental packs made on behalf of respondents and of the industry, respectively, was *sharply conflicting* between witnesses for the Administrator and those for industry (*e. g.*, R. Vol. IV, 636, 657-701).

(f) Industry's quality deterioration evidence ignored.

Petitioner (and other Western packers) testified that the increased pack would destroy the quality of the product and offered elaborate supporting scientific and industrial evidence showing that such an excessive increase in the required drained weight would cram the can, with resultant discoloration, disfiguration, distortion and breakage of oysters, and thereby would destroy the large consumer acceptance of petitioner's product which has been packed and marketed at a uniform standard of fill for more than twenty years as a "quality pack", *i. e.*, one that resembles the natural fresh oyster as closely as possible in color, appearance and taste (R. Vol. III, 170, 185, 200, 214-270; 564-5).

(g) Evidence of "browning" and other quality impairment disregarded.

The Western industry showed by detailed scientific evidence of accredited zoology experts and other qualified scientists that overpacking of large Western oysters beyond the historic 5-ounce fill causes a "browning" or oxidation of exposed surfaces of the oyster which, when overpacked, are forced to protrude above the level of the packing medium nectar within the sealed can of Western oysters. (R. Vol. III, 237, 324-5, 527 537; Vol. IV, 610-14).

This "browning" ranges from a faint yellow tinge

to a heavy brown stain, approximately the color of a package of Philip Morris cigarettes (R. Vol. III, 353).

Browning is not a spoilage, but the average housewife erroneously so concludes, and thereafter rejects the brand that has such discoloration (R. Vol. III, 527).

Overpacking also causes other disfiguration in the form of pressure blemishes, distortion, twisting and breakage (R. Vol. III, 331, 515; Vol. IV, Exs. 14-18).

Modern canning methods are used, and these detriments resulting from overpacking cannot be avoided by improved manufacturing process (R. Vol. III, 236-7, 322).

(h) Southern industry did not challenge Western evidence.

The Southern industry *did not dispute* the Western evidence. In the main the Southern industry confined its plea to an economic one for a uniform quantity of fill, whatever percentage might be fixed, and urged that both branches of the industry return to the historic 5-ounce fill (R. Vol. III, 447, 455).

(i) Sole opposing evidence came from Administrator's witnesses.

The opposing evidence came entirely from the Administrator's witnesses, chiefly from his "investigative and enforcement" officer who contended sometimes by testimony, sometimes by cross-examination, and sometimes by elaborate statements that are impossible to classify (as whether sworn *testimony* in his "witness" capacity, or his unsworn *observations* in his "advocate" capacity) that quality deterioration was

not important; that "browning" was not a significant detriment; that it could be avoided by "*good manufacturing*" processes; and that the Western industry exaggerated the effect of discoloration, distortion and disfigurement (R. Vol. III, 13-91, 368, 374, 383-6, 392-5, 566-602). He ignored substantial consumer preference for the natural flavor that results only by retaining the natural moisture, and subsequently denied the parallel found in the taste differences between canned fresh peas and dried or dehydrated peas which yield two entirely different tasting foods (R. Vol. VI, 980). He ignored evidence which showed that resultant packs of canned oysters when prepared for eating by blanching or light pre-steaming are entirely different and enjoy definite consumer preference over the dehydrated product (R. Vol. III, 554).

(j) Interest of consumers ignored.

No evidence of any kind was offered by respondents as to "interest of consumers" except the Administrator's theory that regardless of appearance or taste, the consumer's interest is better served if all cans have identical drained weight (R. Vol. III, 40). No consumers testified.

(k) Presiding Officer stripped of power to determine credibility of witnesses.

The matter was heard before a Presiding Officer, who, under the terms of his appointment, was authorized only to hear and receive the evidence. He was expressly stripped of any power to weigh or evaluate the *sharply conflicting evidence*, but was directed to:

"Certify the entire record of the proceedings to the Administrator for the *initial* decision." (Vol. II, 1).

(l) The making of the first final order.

Thereafter, the Administrator published a proposed report. Exceptions filed were generally overruled. Petitions for further hearings and reconsideration were filed and denied in their entirety (R. Vol. II, 45-51).

The First Final Order was then issued. It required the 6½ ounce "drained weight" for both Western and Southern oysters and further required that Western oysters be specifically designated in their label as *"Pacific Oysters"*, while authorizing the Southern species of oysters to enjoy thereafter an exclusive use of the long established name *"Oysters"* previously used by both branches of the industry.

(m) Court of Appeals remand of proceeding to Administrator.

After all administrative remedies had been exhausted, petitioner sought judicial review. It showed by pleadings and oral argument the substance of the foregoing; and further showed that during the interim following the first hearing it had developed a new blanching process, which greatly improved the natural qualities of canned oysters, and that the Administrator had refused its request for a further hearing or oral argument to establish the impossibility of complying with these requirements without totally destroying the quality of the product (R. Vol. I, 1-21).

The Court of Appeals determined that prior to considering the entire case on its merits it would direct the Administrator on remand to take additional evidence relating to the new blanching process (R. Vol. V, 40-42).

(n) Improved blanching method of preparing canned oysters shown at second hearing, and quality deterioration that results from excessive pack.

At the second hearing on remand, petitioner showed by further scientific evidence the resultant "browning" and other quality deterioration in such an overpack of the blanched larger Western oysters and the impossibility of avoiding it under the required excessive fill (R. Vol. VII, 713-797; Exs. 25, 26, 27).

It also showed the report of an objective and unbiased consumer food panel, in which petitioner's improved fresh opened and blanched canned oysters were selected as best in quality, appearance and taste (R. Vol. VII, Ex. 28).

(o) Only opposing evidence again came from Administrator's witnesses.

Again, the Southern industry *did not dispute* this evidence, but confined its plea to one for uniform quantity requirements, urging a return for both branches of the industry to the pre-war standard (R. Vol. VII, 1035-48, Ex. 34).

Again, the chief *opposition* came from *sharply conflicting evidence* by the Administrator's "investigative and enforcement" officer who testified, and from his attorney, who cross-examined industry witnesses to

try to support their theory that resultant "browning" and other quality deterioration, as testified to by petitioner, were exaggerated and overstated and could be avoided by good manufacture (R. Vol. VI, 797-835, 882-981).

(p) Presiding Officer again stripped of power to determine credibility of witnesses.

The same examiner presided again. He was again stripped of power to determine the credibility of witnesses or probity of the evidence, but directed to "certify the record to the Administrator" for "decision" (R. Vol. VI, 703).

(q) Administrator's "investigation and enforcement" officer, as witness, and his prosecuting attorney, prepare "findings" based on *ex parte* weighing of their own evidence.

During the course of the second hearing, present counsel for petitioner (who had not theretofore represented Petitioner at the original hearing), was informed that the "findings of fact" underlying the challenged First Final Order, although promulgated under the name of the Administrator had actually been prepared, not by the Examiner who heard the case, nor by the Administrator to whom the record was "certified", and by whom it was signed, but on the contrary was prepared for his signature by the very "investigative and enforcement" witness and his attorney who had opposed all evidence offered by petitioner and other industry witnesses, and who had testified and cross-examined in aid of such opposition.

(r) Presiding Officer's refusal to permit either cross-examination or offer of proof to show this absence of "fair procedure."

Because of the elusive nature of "browning"[12] and the *sharply conflicting testimony* between industry witnesses and this witness for the Administrator as to the causes of browning and as to whether it could be eliminated by good manufacturing processes (R. Vol. VI, 913-5), it became important that whoever was the "fact finder" should be able to evaluate this conflicting evidence objectively and without bias, either intentional or of the unintentional nature, which is elementary in the ancient rule that:

"No man shall be judge in his own cause."

Therefore, Petitioner on cross-examination sought to confirm his information that it was this very witness and his attorney who had prepared and written the "findings of fact" in the First Final Order (R. Vol. VI, 960), including so much of paragraph 6 thereof as relates to "browning" (R. Vol. VI, 961); and the sentences which state that:

> "Browning is a type of discoloration occurring in oysters protruding above the packing medium,"

and which purport to find that:

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[12]The Presiding Officer injected into Petitioner's cross-examination as to use of the terms "slight browning", "medium browning", and "heavy browning", his observation:

> "I think the administrator can take official notice, and any court can take *judicial notice* that *this term* which we are now discussing extensively, and I might add, needlessly, *has no standard, no standard of specificity.*" (R. Vol. VII, 913).

"It is related to the amount of entrapped air in the can at the time of closure." (Ibid, p. 962), and that:

"Excessive entrapped air can be avoided in good manufacturing process." (R. Vol. VII, p. 985, 991-2)

Every effort of petitioner on cross-examination to make such inquiries was blocked by the Presiding Officer, sometimes on his own motion and in the absence of any objection, and sometimes on objection of respondents' attorney.

Thereupon, counsel for petitioner began an offer of proof that:

"* * * in violation of my understanding of the Administrative Procedure Act, §5(c), the order in issue of March 10, 1948, violates so much of that section as provides that 'save to the extent required for the disposition of ex-parte matters as authorized by law, no such officer (referring to the officers who presided at the hearings) shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate, nor shall such officer * * *' ." (R. Vol. VII, 993)

But before Petitioner could even conclude its offer of proof to show violation of the Administrative Procedure Act and of procedural due process, the Presiding Officer interrupted, and refused to permit Petitioner to complete the offer of proof, and directed counsel to proceed with permissible cross-examination (R. Vol. VII, 994), contending that the offer of proof was:

"* * *entirely irrelevant to these proceedings,

> because what you are referring to, sir, relates exclusively to quasi-judicial matters; this rule making is quasi-legislative, and I do not think you are gaining anything by any extended discussion of §5 or any part of it."

Many other irregularities believed fatal to the validity of the two orders were alleged. Most of them are considered in the opinion of the Court of Appeals; and are summarized in the Petition for Rehearing (R. Vol. XII, 1-53), to which this Court's attention is respectfully invited.

VI. ARGUMENT

(a) The agency's procedure, approved by the lower court, calls for an exercise of this court's power of supervision. If sanctioned it would nullify requirements of "fair play" and permit the responsible fact-finder to rubberstamp work prepared ex parte by one of the adversary witnesses.

It is repeated for emphasis that petitioner does not challenge the *personal* integrity of the government officials but does challenge the *official* integrity of a procedure which permits a government witness first to testify and then to appraise the credibility of his own evidence.

The rule "No man shall be a judge in his own cause" finds universal application in judicial and administrative procedure. An early Washington case states it well. In *Maitland v. Zanga*, 14 Wash. 92, 95, 44 P. 117 (1896), the court held:

> "* * * if this practice were to be tolerated, that the judge * * * would be compelled to pass upon the weight of his own testimony, * * *

> *considering the inclination of the human mind to attach more importance to its own statements than to those of others,* it is easy to see that *the rights* of the *litigants might be prejudiced* in such a case."

This court has stated it even better and has squarely applied the principle to administrative proceedings in the *Second Morgan* case, *supra*, 304 U.S. at 19-20:

> "* * * *If in an equity cause,* a special master or *the judge permitted the plaintiff's attorney to formulate the findings* upon the evidence, conferred *ex parte* with the plaintiff's attorney regarding them, and *then adopted his proposals* without affording an opportunity to his opponent to know their contents and present objections, *there would be no hesitation in setting aside the report or decree* as having been made without a fair hearing. The *requirements of fairness are not exhausted in the taking or consideration of evidence* but extend to the concluding parts of the procedure as well as to the beginning and intermediate steps."

That case involved "rule-making" for cattle. Is there any legal difference between a "rule-making" order which prescribed *ratios* of *fill* for canned *oysters* required *to be observed in the future,* and a "rule-making" order which prescribed *rates* of *brokerage* for shipped *cattle* required *to be observed in the future* insofar as "fair procedure," "fundamental requirements of fairness," and "basic concepts of fair play" are concerned?

The Court of Appeals ignored this case and this principle, though strongly relied on by petitioner in

brief and in argument. That court said that in "rule-making":

> "there is no constitutional right to any hearing whatsoever." (R. Vol. XI, 26)

It is respectfully submitted the Court of Appeals was in error in founding its opinion upon so broad a statement.

First: The orders are void because they do violate constitutional rights of petitioner to a fair hearing. When Congress by express legislation requires a hearing and that findings of fact be based solely on the evidence of record, *constitutional* safeguards of procedural due process are required as well as *statutory* provisions.. *Morgan v. United States*, 298 U.S. 468, 481-2 (1936).

Once a hearing has been required by statute, it necessarily requires a fair and full hearing. *Carter v. Kubler*, 320 U.S. 243, 247 (1943); *Chicago Junction Case*, 264 U.S. 258, 264-5 (1924); *Mahler v. Eby*, 264 U.S. 32, 44 (1924).

The inexorable safeguard which the due process clause assures is that the trier of the facts shall be an impartial tribunal. *Morgan v. United States*, 304 U.S. 1, 22 (1938).

Second: The orders are void under the Administrative Procedure Act. It provides that:

> "Sec. 12. Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. * * *"

This Act therefore in no way restricts the scope

of this court's requirements of judicial due process. The question is whether the Administrative Procedure Act *also* forbids such unfair procedure, particularly §5(c), set forth in Appendix A, hereof, ~~P. 8.~~ *pp. 6-7*

In the Attorney General's Manual on the Administrative Procedure Act (1947) he states at page 13 that the definitions of "rule" and "rule-making" and of "order" and "adjudication"

> "leave many questions as to whether particular proceedings are *rule-making* or *adjudication*,"

and that:

> "Typically, *the issues* (*in rule-making*) *relate not to* the *evidentiary facts*, as to which the *veracity* and demeanor *of witnesses* would often be important, *but* rather *to* the *policy-making conclusions* to be drawn from the facts." (p. 14)

This case is not such typical "rule-making." It does relate specifically to the *veracity* and *credibility* of witnesses.

In drafting the Act, much reliance was placed upon the Final Report of the Attorney General's Committee (1941), (Sen.Doc. 8, 77th Congress, 1st Sess.). In discussing rule-making that report stated, at pages 108-110:

> "Hearings in rule-making are usually * * * investigatory * * *. The purpose is not to try a case * * *.
>
> "Rule-making proceedings do occur, however, in which an adverse element is present. It may be clear in advance which interests will benefit and which will suffer if proposed regulations are issued. * * * *Under these circumstances it may be desirable to* let affected parties *treat the rule-*

making proceedings as adversary, so that all the information, conclusions, and arguments submitted to the agency may be *publicly* disclosed to opposing interests which may answer, explain, or rebut. * * *

"*Hearings of this type may be held* * * * *because of statutory requirements, as in the case of the Food and Drug Administration* * * *."

Again, at page 56, the Committee Report stated:

"*Two characteristic tasks of a prosecutor are those of investigation and advocacy. It it clear that when a controversy reaches the stage of hearing and formal adjudication the persons who did the actual work of investigating and building up the case should play no part in the decision.* * * * Of course, *this may produce a state of mind incompatible with* the objective *impartiality* which must be brought to bear in the process of deciding. *For this same reason*, the advocate—*the agency's attorney* who upheld a definite position adverse to the private parties at the hearing —*cannot be permitted to participate* after the hearing *in* the making of *the decision.* **A man who has buried himself in one side of an issue is disabled from bringing to its decision that dispassionate judgment which Anglo-American tradition demands of officials who decide questions.** *Clearly the advocate's view ought to be presented publicly and not privately to those who decide.*"

The author of the bill, Senator McCarran, in reporting the bill to the Senate, said:

"The exemption of rule making and determining applications for licenses, from provisions of section(s) * * *, 5(c), * * * may require change if, in practice, it develops that they are too

> broad. The committee believes it has followed sound discretion in selection of the language used, and *it is the feeling of the committee that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions.*"[13]

Clearly, as stated by this court in the *first Morgan* case, 298 U.S. 468, 481-2, the rule that the officer who makes the determination must consider and appraise the evidence:

> "does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. *Assistants* may prosecute inquiries. Evidence may be taken by an *examiner*. Evidence thus taken may be sifted and analyzed by competent *subordinates*."

But from this contention respondents in their brief argue, and the Court of Appeals sustained them, that because the proceeding is denominated "rule making," there is no statutory or constitutional prohibition against the *adverse witness* subsequently being the "*competent subordinate*" who prepares the findings of fact, including a power to act for him in resolving

> "any conflicts in the evidence and to decide whether the testimony of witnesses who appeared in the hearing should be believed."[14]

The present question is whether such a practice accords with the intent of Congress. The very first words of the Administrative Procedure Act describe it as:

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[13]Administrative Procedure Act, Legislative History, 79th Cong., S. Doc. 248, pp. 324-5.

[14]Respondents' brief before Court of Appeals, page 33.

> "AN ACT to improve the administration of justice by prescribing *fair* administrative procedure."

The legislative history abounds with an intent to fulfill such a purpose. To strain the "dichotomy" to the extent sought by respondents and sustained by the Court of Appeals would over-emphasize the words "rule making" at the expense of "fair procedure" in adversary proceedings. It is the substance of what the agency has purported to do which is decisive. *Columbia System v. United States*, 316 U.S. 407, 417 (1942).

> "Overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect."
>
> *Powell v. United States*, 300 U.S. 276, 285 (1937).

As stated in *United States v. Abilene & So. Ry.*, 265 U.S. 274, 289 (1924):

> "Every proceeding is adversary, in substance, if it may result in an order in favor of one * * * as against another."

The order is void under a proper interpretation of the terms of the Administrative Procedure act because in violation of its provisions and intent, investigative and enforcement officers participated in the preparation of the decision of an adversary proceeding and were not limited to their lawful capacity as witness and as counsel, respectively, in public proceedings.

Third: The order is void under the Federal Food, Drug and Cosmetic Act. The terms of the requirements of that Act are clear that orders shall be based

on findings of fact and evidence made in a public record, §701(e). The Congressional intent to preserve constitutional precepts of fair procedure is likewise clear, §701(f); Appendix A, hereof, pp. 1, 2.

To exempt the proceedings from standards of judicial due process and fair procedure is contrary to Congressional intent. Chairman Lea of the House Committee reporting the Act stated that §701(e) was drafted:

> "before the Supreme Court made its famous decision in the (second) *Morgan* case (304 U.S. 1), but it, in substance, provides that the legislative agency shall do the very things that the Supreme Court said they should do in the *Morgan* case." 83 Cong. Rec. 9096 (1938)

If the Food and Drug Administration's own employees may prepare proposed standards, testify as experts, and thereafter participate in drafting of regulations, then judicial review can avail little.

But judicial review was intended to avail much. Referring to judicial review, the Chairman stated:

> "* * * We give more authority * * * under this bill than any white man ought to have unless with it there is proper restraint by the courts. That is what we have tried to do here." 83 Cong. Rec. 7776 (1938)

This court's rule of fair procedure in the first and second *Morgan* cases was referred to and identified specifically by name no less than five times by Chairman Lea during the course of his statement of the

Committee's intent. 83 Cong. Rec. 7775, 7776, 9098, 9099,[15]

It is respectfully urged that the legislative history of the Federal Food, Drug and Cosmetic Act made it abundantly clear that Congress intended the specific standards heretofore considered in these two *Morgan cases*, to measure "fair procedure" under that Act, and that so measured, the present orders are void and must be set aside, or remanded for further proceedings not inconsistent therewith.

(b) The decision of the Court of Appeals is in conflict with other decisions of other Courts of Appeal.

Assuming, *arguendo*, that it is violative of constitutional and statutory principles for the witness who took one side of the controversy to be permitted thereafter *ex-parte* to prepare, for the Administrator's signature, findings, which "sift-in" that witness's testimony and "sift out" the conflicting evidence, then the refusal to permit cross-examination to develop these

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[15]The entire legislative history is conveniently reprinted and quoted in full text from pertinent volumes of the Congressional Record, and relevant House and Senate Committee Hearings and Reports in one bound volume, *Dunn, Food, Drug and Cosmetic Act* (G. E. Stechert & Co., New York, 1938), and the accompanying separately bound *Dunn, Index to Federal Food, Drug and Cosmetic Act* (G. E. Stechert & Co., 1940).

The *second Morgan* case was decided by the Supreme Court *April 25, 1938*, re-hearing denied *May 31, 1938* (304 U.S. 1, 23).

The statements were made by Chairman Lea on the floor of the House *after* that decision, during the period from May 31 to June 15, 1938. (*Dunn*, 840, 924, 969, 996-7, 1010, 1012, 1015).

facts, and the interruption and refusal to even permit completion of such an offer of proof, is a fatal defect.

The Court of Appeals held that:

> "To exclude an offer of proof is a dangerous and imperfect practice." (R. Vol. XI, 22)

But the court stopped short there, and did not invalidate the order for such failure. This is in conflict with a decision of the Sixth Circuit. In *Powhatan Mining Co. v. Ickes*, 118 F.(2d) 105, 110 (C.C.A. 6, 1941) that court held a similar order void, stating:

> "* * * One who has been denied access to information or deprived of the privilege of cross-examination on pertinent matters is not in a position to make an offer of proof as to those matters. Likewise, a reviewing court cannot know what a full hearing might have shown and for that reason is not free to speculate as to the prejudice involved in such an erroneous ruling."

There also appears to be conflict with the Court of Appeals for the Third Circuit as to want of judicial due process. In *Berkshire Employees Association v. National Labor Relations Board*, 121 F.(2d) 235 (C. C.A. 3, 1941), the court held an order made under similar circumstances void, stating, p. 23:

> "* * * It is comparable to the situation of a lawyer who has represented a client in an endeavor to get a settlement of a claim and, before the claim is settled, is appointed to the bench and sits in the very case as judge. * * * We conclude that in this case the facts, if proved, show a case which goes beyond the line of fair dealing with a particular litigant."

The decision also appears to be at variance with a

very recent decision of the Court of Appeals of the District of Columbia in *Dorsey v. Kingsland*, 173 F. (2d) 405, 410 (1949); certiorari granted April 15, 1949. No. 729 (Oct. Term, 1948) *Kingsland v. Dorsey*, ...U.S. .....; 69 S.Ct. 1160 (Adv.sh.). In that case the Court of Appeals held:

> "* * * in 1922, the doctrine of *'administrative finality' (or administrative infallibility) had never been heard of. But by 1936 this theory was thoroughly familiar* to lawyers and *Congress proceded to legislate upon it*, among other things, *by passing the Administrative Procedure Act* * * *. Under Section 10(e) of* * * * (that) *Act, it became the right and indeed the duty of the court* * * * *to* judicially review the action of any agency, and it may *review the whole record* * * * *for the purpose of ascertaining any prejudicial error. Under these provisions the burden of proof must be upon the proponent of the rule to show cause.*
>
> "The whole legislative history of the Administrative Procedure Act and more particularly *the luminous discussion on the floor of the Senate between three of the leading lawyers of the Senate, Senators George, McCarran and Ferguson conclusively show that it was the inflexible intention of Congress to* * * * *'establish a guide for administrative groups* so that they would apply the rule in such a way that there would be substantial probative evidence behind their findings, and *so that they could say, "We are not afraid to have our findings reviewed by a court."* * * *'
>
> * * * * * * * * * * *
>
> "* * * *the trial court by the extremely narrow view of its own jurisdiction, limiting it in effect to the 'administrative finality' and 'abuse of*

discretion' doctrines, has denied the appellant *the protection of the statutes mentioned and in effect permitted him to be deprived of a valuable right without due process."*

(c) The decision of the Court of Appeals presents important matters in the administration of the Federal Food, Drug and Cosmetic Act and in the interpretation of the Administrative Procedure Act which have not been, but should be, determined by the court.

Only one case has reached this court concerning the power of the Administrator to prescribe mandatory food standards under §401 of the Federal Food, Drug and Cosmetic Act. *Security Administrator v. Quaker Oats Company*, 318 U.S. 218 (1943). That case turned on fundamental principles of the "substantial evidence" rule with which petitioner does not take issue as a matter of law.

The present case challenges the fairness by which the Administrator, through his signature, endorsed the wholly partisan opinions first given under oath as evidence, then "sifted in" by the same witness as "findings of fact." This is utterly violative of due process. Other legal deficiencies, including want of substantial evidence, spring from such denial.

A decision on the scope of protection afforded by the Administrative Procedure Act is of great importance to all administrative agencies, litigants appearing before them and Appellate Courts. This case presents inescapably by pleadings, record and brief the issue of basic fairness. In a scholarly opinion by Circuit Judge Hutcheson, *National Labor Relations Board v. Phelps*, 136 F.(2d) 562, 563-4 (C.C.A. 5, 1943), that Court

relied upon many prior decisions of this court, including the *first* and *second Morgan* cases, and held:

> "* * * *Nor will the fact that an examination of the record shows that there was evidence which would support the judgment,* at all *save a trial from the charge of unfairness,* for *when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceeding. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand.*"

If there be no constitutional and statutory prohibition against the adverse government witness subsequently preparing *ex parte* the findings, which "invariably" *write up* the government evidence and "consistently" *write down* the private citizen's evidence,[16] then the elaborate statutory requirements for hearings based on evidence are set at naught, and safeguards of judicial review become a mirage.

It is earnestly submitted that the lower court's opinion and decree does more than hurt this petitioner. It hurts good government, and the confidence of citizens in it. It can so easily be avoided by a judicial decision by this court which permits the Administrator to employ "competent subordinates" who are unbiased to aid him in digesting conflicting testimony and preparing appropriate findings. It is only required to exclude from the ranks of such "competent subordinates" the government's witnesses and at-

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[16]Austern, the Formulation of Mandatory Food Standards, *supra*, p. 11.

torneys who had "buried themselves in one side" of an adverse proceeding by testifying, advocating, and preparing one side of a sharply controverted dispute.

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted.

Dated at Seattle, Washington, August 17, 1949.

Respectfully submitted,

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APPENDIX A

The Federal Food, Drug, and Cosmetic Act of June 25, 1938, c. 675, 52 Stat. 1040 [21 U.S.C.A. (Supp.) 301, *et seq.*], in parts pertinent to this case, provides:

"Sec. 401 (21 U.S.C.A. 341). *Whenever* in the judgment of the Administrator *such action will promote honesty and fair dealing in the interest of consumers*, he shall promulgate regulations fixing and establishing for any food, *under its common or usual name so far as practicable*, a *reasonable* definition and standard of identity, a *reasonable* standard of quality, *and/or reasonable* standards of fill of container * * *.

"Sec. 701(a) [21 U.S.C.A. 371(a)]. The authority to promulgate regulations for the efficient enforcement of this Act, except as otherwise provided in this section, is hereby vested in the Administrator.

* * * * * * * *

"Sec. 701(c) [21 U.S.C.A. 371(c)]. Hearings authorized or required by this Act shall be conducted by the Administrator or such officer or employee as he may designate for the purpose.

* * * * * * * *

"Sec. 701(e) [21 U.S.C.A. 371(e)]. The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, *shall hold a public hearing* upon a *proposal* to issue, amend, or repeal any regulation contemplated by any of the following sections of this Act: 401 * * * The Administrator shall give *appropriate* notice of the hearing, and the notice shall set forth the proposal in general terms and specify the time and place for a public hearing to be held thereon *not less than thirty*

days after the date of the notice, * * *. At the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the Administrator shall by order make public his action in issuing, amending or repealing the regulation or determining not to take such action. The Administrator shall base his order *only on substantial evidence of record at the hearing* and shall set forth as part of the order detailed findings of fact on which the order is based. * * *

"Sec. 701(f) [21 U.S.C.A. 371(f)]. In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United States * * *. The Administrator, promptly upon service of the summons and petition, shall certify and file in the court the transcript of the proceedings and the record on which the Administrator based his order.

"(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his

recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

"(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. If * * * such order is *not in accordance with law* the court shall by its judgment order the Administrator to take action * * * in accordance with law. *The findings of* the Administrator as to the *facts, if supported by substantial evidence, shall be conclusive.*

"(4) The judgment of the court affirming or setting aside, in whole or in part, any such order of the Administrator shall be final, subject to review by the Supreme Court of the United States upon *certiorari* or *certification* as provided in sections 239 and 240 of the Judicial Code, as amended.

"(5) Any action instituted under this subsection shall survive notwithstanding any change in the person occupying the office of Administrator or any vacancy in such office.

"(6) The remedies provided * * * shall be in addition to * * * any other remedies provided by law."

The Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237 [5 U.S.C.A. (Supp.) 1001, *et seq.*], in parts pertinent to this case provides:

"DEFINITIONS

"Sec. 2 (5 U.S.C.A. 1001) as used in this Act—

"(a) AGENCY.—'Agency' means each authority * * * of the Government of the United States. * * * * * * * *

"(c) RULE AND RULE MAKING.—'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy * * * and includes the approval or prescription for the future of rates * * * or practices * * *. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule.

"(d) ORDER AND ADJUDICATION.—'Order' means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. 'Adjudication' means agency process for the formulation of an order.

"(e) LICENSE AND LICENSING.—'License' includes the whole or part of any agency *permit*, certificate, *approval*, registration, charter, membership, statutory exemption or other form of permission. 'Licensing' includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation amendment, modification, or conditioning of a license.

* * * * * * *

"(g) AGENCY PROCEEDING AND ACTION.—'Agency proceeding' means any agency process as defined in subsections (c), (d), and (e) of this section. 'Agency action' includes the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

"PUBLIC INFORMATION

"Sec. 3. (5 U.S.C.A. 1002) * * *

"(a) RULES.—*Every agency shall separately state and currently publish in the Federal Register* * * * (3) *substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.*

* * * * * * * *

"RULE MAKING

"Sec. 4 (5 U.S.C.A. 1003) * * *

"(a) NOTICE.—General notice of proposed rule making shall be published in the Federal Register * * * and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice or hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure, or practice, * * *.

* * * * * * *

"(b) PROCEDURES.—* * *. *Where rules are required by statute to be made on the record after opportunity for an agency hearing, the requirements of sections 7 and 8 shall apply* in place of the provisions of this subsection.

"ADJUDICATION

"Sec. 5 (5 U.S.C.A. 1004). *In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing,* * * *.

"(a) NOTICE.—*Persons entitled to notice of an agency hearing shall be timely informed of* (1) the time, place, and nature thereof; (2) the legal authority and jurisdiction under which the hearing is to be held; and (3) *the matters of fact and law asserted. In instances in which private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the times and places for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.*

* * * * * * * *

"(c) SEPARATION OF FUNCTIONS.—The same officers who preside at the reception of evidence pursuant to section 7 shall make the recommended decision or initial decision required by section 8 except where such officers become unavailable to the agency. * * *, no such officer shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. *No officer, employee, or agent engaged in the performance of investigative or prosecuting functions* for any agency in any case *shall*, in that or a factually related case, *participate or advise in the decision*, recommended decision, or agency review pursuant to section 8

except as witness or counsel in public proceedings. This subsection shall not apply in determining applications for initial licenses or to proceedings involving * * * rates, facilities, or practices of public utilities or carriers; nor shall it be applicable in any manner to the agency or any member or members of the body comprising the agency. * * *

"HEARINGS

"Sec. 7. (5 U.S.C.A. 1006). *In hearings* which section 4 or 5 requires to be conducted pursuant to this section—

"(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; * * *. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conducted in an impartial manner. * * *

"(b) HEARING POWERS.—*Officers presiding at hearings shall have authority,* subject to the published rules of the agency and within its powers, *to* (1) administer oaths and affirmations, (2) issue subpoenas authorized by law, (3) *rule upon offers of proof and receive relevant evidence,* (4) take or cause depositions to be taken whenever the ends of justice would be served thereby, (5) regulate the course of the hearing, (6) hold conferences for the settlement or simplification of the issues by consent of the parties, (7) dispose of procedural requests or similar matters, (*8*) *make decisions or recommend decisions in conformity with section 8, and (9) take any other action authorized by agency rule consistent with this Act.*

"(c) EVIDENCE.—Except as statutes otherwise provide, *the proponent of a rule or order shall have the burden of proof.* Any oral or documentary evidence may be received, but *every agency shall* as a matter of policy *provide for* the *exclusion of irrelevant,* * * * *evidence and no* sanction shall be imposed or *rule or order be issued except upon consideration of the whole record* * * * *and as supported by* and in accordance with the *reliable, probative, and substantial evidence.* Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. * * *

"(d) RECORD.—The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 8 * * *. *Where any agency decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall* on timely request *be afforded an opportunity to show the contrary.*

"DECISIONS

"Sec. 8. (5 U.S.C.A. 1007). In cases in which a hearing is required to be conducted in conformity with section 7—

"(a) ACTION BY SUBORDINATES.—In cases in which the agency has not presided at the reception of the evidence, the officer who presided (or, in cases not subject to subsection (c) of section 5, any other officer or officers qualified to preside at hearings pursuant to section 7) shall initially decide the case or the agency shall require (in specific cases or by general rule) the entire record

to be certified to it for initial decision. Whenever such officers make the initial decision and in the absence of either an appeal to the agency or review upon motion of the agency within time provided by rule, such decision shall without further proceedings then become the decision of the agency. On appeal from or review of the initial decisions of such officers the agency shall, except as it may limit the issues upon notice or by rule, have all the powers which it would have in making the initial decision. Whenever the agency makes the initial decision without having presided at the reception of the evidence, such officers shall first recommend a decision except that in rule making or determining applications for initial licenses (1) in lieu thereof the agency may issue a tentative decision or any of its responsible officers may recommend a decision or (2) any such procedure may be omitted in any case in which the agency finds upon the record that due and timely execution of its functions imperatively and unavoidably so requires.

"(b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions)

shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

* * * * * * * * *

"JUDICIAL REVIEW

"Sec. 10. (5 U.S.C.A. 1009) * * *

"(a) RIGHT OF REVIEW.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

* * * * * * * * *

"(c) REVIEWABLE ACTS.—*Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action.* * * *

* * * * * * * *

"(e) SCOPE OF REVIEW.—*So far as necessary to decision* and where presented *the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall* * * * (B) *hold unlawful and set aside* agency action, *findings, and conclusions found to be* (1) *arbitrary, capricious, an abuse of discretion,* or otherwise not in accordance with law; (2) *contrary to*

constitutional right, power, privilege, or immunity; (3) *in excess of statutory jurisdiction*, authority, or limitations, or short of statutory right; (4) *without observance of procedure required by law;* (5) *unsupported by substantial evidence* in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; * * * *In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party*, and due account shall be taken of the rule of prejudicial error."

* * * * * * * *

"CONSTRUCTION AND EFFECT

"Sec. 12. *Nothing in this Act shall be held to diminish the constitutional rights of any person or to limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, all requirements or privileges relating to evidence or procedure shall apply equally to agencies and persons.* * * *"

No. 280

In the Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC., PETITIONER

vs.

OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD and DRUG ADMINISTRATION, RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Dated at Seattle, Washington, October 14, 1949.

THE ARGUS PRESS, SEATTLE

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It is respectfully submitted that respondents in their Brief in Opposition have misrepresented the facts and law to the prejudice of petitioner. Illustrative examples will be cited.

CONFLICTING STATEMENTS OF THE CASE

1. On the first full page thereof, respondents state that:

> "* * * the War Production Board *decided* that there was wastage of tin plate in oyster canning because of the light 5-ounce fill." (Br. Opp. 5)

The War Production Board "decided" no such thing. It held no hearing. It rendered no decision. It issued only its fiat or order (appropriately enough during war time) to "conserve tin" by restricting tin plate to those who could pack oysters to a 7½ ounce fill. This excluded petitioner and other Western packers and imposed hardship on

Southern packers (R. Vol. III, 46, 204, 403, 453-5, 554-5). If such was a "decision," even the respondents have since repudiated it by the instant 1948 orders, which find that a 6½ ounce fill (and not 7½ ounces) is in "the interest of consumers" (R. Vol. I, 44-5).

2. Again, respondents state that their 1944 order was "*largely* inapplicable" to Pacific or Western oysters (Br. Opp. 6). The truth is the 1944 order was by its terms *specifically* inapplicable to Western oysters (R. Vol. I, 48-9, 50-1).

3. Again, respondents state that the 1948 order:

> "contained detailed findings of fact." (Br. Opp. 7)

This indeed is true, but in reciting the findings respondents lift themselves by their bootstraps by iteration and reiteration of the very "findings" that have been challenged herein as being prepared in a partisan manner for the respondent Administrator's signature:

> "by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents * * * to know the claims thus presented and to contest them. *That is more than an irregularity in practice; it is a vital defect.*" (*Morgan v. United States*, 304 U.S. 1, 22 (1938).

4. Again, having thus lifted themselves by their bootstraps, respondents incorrectly state that:

> "The Administrator '*concluded*' that it would not promote honesty and fair dealing in the interest of consumers to return to the 5-ounce fill; * * *." (Br. Opp. 8)

That is the very issue in the case. Petitioner has alleged and offered to prove throughout this case that the Administrator "concluded" no such thing, but that *per contra*, the government enforcement officer and witness

Callaway, and the government attorney Goodrich (now one of the signatories to respondents' instant Brief in Opposition), were the persons who so "concluded" after an "*ex parte* discussion" with the Administrator and "without according any reasonable opportunity" to petitioner "to know the claims thus presented, and to contest them."

In their Brief, respondents virtually concede these unlawful acts. But respondents contend that the Federal Food, Drug and Cosmetic Act:

> "does not preclude consultation between the Administrator and subordinate personnel in food standards proceedings, and the due process clause implies no such prohibition." (Br. Opp. 17)

Thus, the respondents ignore the basic rudiments of fair play prescribed by the second *Morgan* case, 304 U.S. 1, *passim, supra,* and cases cited therein.

5. Again, respondents assert that the findings of fact and conclusions "made" by the Acting Administrator in the second 1948 order are the basis upon which he "concluded" that it would not promote honesty and fair dealing to permit a separate standard for blanched Western oysters (Br. Opp. 11, 12). But such "findings" prepared *ex parte* in consultation with the prosecutor and prosecuting witness are not the requisite findings of fact made with:

> "that dispassionate judgment which Anglo-American tradition demands of officials who decide questions"[1]

These private views of the investigative and enforcement officials and of the agency's attorneys should have been presented publicly and not privately to those who decide. *Morgan v. United States, supra,* 304 U.S. at 22.

6. Respondents next cite without direct quotation various

[1]Administrative Procedure in Government Agencies (1941) Sen. Doc. 8, 77th Cong., 1st Sess. 56.

pages of the Court of Appeals' opinion, and thereafter quote a subsequent portion thereof (Br. Opp. 13). It is respectfully submitted that any objective reading of the opinion of the Court of Appeals will confirm that that Court entertained grave doubts as to the validity of the challenged orders, but felt constrained by their interpretation of this Court's substantive evidence rules to affirm a portion of the order. For example, the Court said:

> "The Administrator found, and there was evidence tending to show, that the eleven ounce can *could* be filled to yield 6½ ounces net drained weight (by filling the can to approximately 9 ounces) by the use of the blanching method without a substantial increase in the incidence of the above mentioned detractive features."

* * * * * * * * * * *

and:

> "Even though *we* might feel that petitioner's evidence was the more convincing, and *we* might have concluded differently, the evidence considered in its entirety, is clearly sufficient to support the findings made." (Emphasis in Court's text) (174 F.(2d) at 688, 689)

The fundamental error in the Court of Appeals' opinion and decree was its reliance on such "findings" prepared *ex parte* by the government's active prosecutors and witnesses who "sifted in" portions of the evidence favorable to them and "sifted out" and totally disregarded other opposing and equally persuasive evidence.

7. Again, respondents seek to justify the orders by asserting that:

> "No amount of argument can successfully refute the proposition that * * * the person who buys a can of oysters * * * weigh(ing) 11 ounces actually receives only 5 ounces of oyster meat." (Br. Opp. 15-16)

It is submitted that such an argument is not properly in

opposition to a Petition for Certiorari, but to the merits, when thereafter reached. A considerable "amount of argument" may be validly considered at that time to refute respondents' asserted "proposition," *e. g.*:

> *First,* the asserted "proposition" ignores the fact that it is respondents who fixed a fill of 6½ ounces of oyster meat in an 11 ounce can. Therefore, there must be great merit in the contention that the quantity of oyster meat (whether 5, 6½ or 7½ ounces) under any circumstances is considerably lower than the weight of the can. *The critical question is whether there has been a fair determination* of *whatever* quantity is fixed — the difference between 5 ounces and 6½ ounces is a 30% increase; that between 5 and 7½ ounces is 50%.
>
> *Second,* respondents' asserted "proposition" ignores substantial evidence that the remaining ounces in the can are not "water," as they allege (Br. Opp. 12), but under petitioner's "blanching" process consists of oyster nectar containing a high value of food content (R. Vol. VII, Ex. 30). But respondents seek to lift themselves by their bootstraps by relying on the same self-serving "findings" prepared by the prosecutors and which deprecate the scientific evidence offered by petitioner to establish the high nutritive food value of the surrounding liquid.

8. Again, respondents beg the fundamental question in this case by asserting that:

> "The proceeding before the Administrator was not quasi-judicial in character." (Br. Opp. 16)

The term "quasi-judicial" is elusive. If by "quasi-judicial" respondents mean an adjudication solely of a past controversy, respondents would be correct in contending that this proceeding is not quasi-judicial. But if by the term "quasi-judicial," respondents mean a proceeding "as if," or similar to, that of a judicial tribunal whose find-

ings are made objectively by a non-biased court and solely on the basis of evidence offered at a public hearing, then most assuredly the challenged proceedings are "quasi-judicial." *Chicago Junction* case, 264 U.S. 258, 264-5 (1924); *Powell v. United States,* 300 U.S. 276, 285 (1937).

9. Again, respondents erroneously allege that petitioner has asserted:

> "some sort of *vested right* to continue a 5 ounce fill." (Br. Opp. 15)

This likewise is wholly false. Petitioner has never asserted such a claim, or anything resembling it.

The only "vested right" that petitioner claims is that requisite findings be made in accordance with law, and the "basic rudiments of fair play," preserving the "inexorable safeguard which the due process clause assures • • • that the trier of the facts shall be an impartial tribunal." *Morgan v. United States,* 304 U.S. 1, 22 (1938); *Carter v. Kubler,* 320 U.S. 243, 247 (1943); *St. Joseph Stock Yards v. U.S.,* 298 U.S. 38, 73 (1936).

10. Respondents erroneously assert that the second *Morgan* case, *supra,* was not "ignored" by the Court of Appeals (Br. Opp. 18). But a careful examination of that Court's opinion shows that no reference is made to the controlling principles of that case, nor is there any citation or reference to it. Respondents' contention is unfounded, and rests only on its own sweeping and self-serving denial.

11. Respondents next brush aside three conflicting decisions of other Courts of Appeal with but a sweeping footnote conclusion that they are "inapposite" (Br. Opp. 21). It is submitted the conflicting opinions must speak for themselves and that any fair reading rebuts such contentions by respondents.

12. Lastly, respondents cite from the opinion of the Court of Appeals (Br. Opp. 25) to the effect that petitioner's arguments are supported only by reference to Congressional "hearings" (174 F.(2d) at 693). This statement by the Court of Appeals is in error. It was not on the basis of "*hearings,*" but on the basis of the *same* committee *reports* which respondents cite in their own immediately preceding paragraph (Br. Opp. 25) that petitioner has consistently relied (R. Vol. XII, 22-34); S. Rep. 752, 79th Cong., 1st Sess., p. 18; H. Rep. 1980, 79th Cong., 2d Sess., p. 30 (being the *same* reports and *identical* page references cited by respondents).

And the Chairman of the Senate Committee in reporting the bill to the Senate (which thereafter passed unanimously) stated:

> "The exemption of rule making and determining applications for licenses, from provisions of sections 5(c), 7(c), and 8(a) may require change if, in practice, it develops that they are too broad. The committee believes it has followed sound discretion in selection of the language used, and *it is the feeling of the committee that, where cases present sharply contested issues of fact, agencies should not as a matter of good practice take advantage of the exemptions.*"[2]

ARGUMENT

The fundamental question is whether "*fair procedure*" is required under the Constitution and under the Administrative Procedure Act and Federal Food, Drug and Cosmetic Act, where the findings resolve "sharply controverted factual issues."

Or, stated conversely: Is a court having jurisdiction to

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[2]Administrative Procedure Act, Legislative History (1947) 79th Cong. 2d. Sess. S. Doc. 248, pp. 324-5.

review, powerless to act to protect a litigant who is the victim of "unfair procedure"?

The Court of Appeals found that one of the two major portions of the Administrator's order was:

> "extremely *arbitrary, capricious* and *unreasonable* when examined in the light and against the background of the order's entire effect." (R. Vol. XI, p. 31).

and

> "*outside the bounds of reason and fairness* * * * (and) * * * *manifestly unfair* to that portion of the industry discriminated against, and to that extent we regard the requirement as *arbitrary, capricious* and an *abuse of discretion.*" (R. Vol. XI, p. 32) 174 F. 2d at 699

It is most earnestly urged, in the light of the utter condemnation by the Court of Appeals of a substantial portion of respondents' orders, and in the light of the earnest contentions herein that the basic rudiments of fair play were mutilated and destroyed by respondents' procedure, that the entire case calls for an exercise of this Court's power of supervision.

The critical difficulty is the total absence of a fair and objective method by which respondents seek to evaluate conflicting evidence. If this be lawful, then the elaborate Congressional provisions for quasi-judicial hearings in food and drug matters are empty and meaningless, and afford no protection whatever to citizens adversely affected.

We can conclude no better than by requoting the two concluding paragraphs of the Petition for Certiorari:

> "If there be no constitutional and statutory prohibition against the adverse government witness subsequently preparing *ex parte* the finding, which 'invariably' *write up* the government evidence and 'consistently' *write down* the private citizen's evidence,

then the elaborate statutory requirements for hearings based on evidence are set at naught, and safeguards of judicial review become a mirage.

"It is earnestly submitted that the lower court's opinion and decree does more than hurt this petitioner. It hurts good government, and the confidence of citizens in it. It can so easily be avoided by a judicial decision by this court which permits the Administrator to employ 'competent subordinates' who are unbiased to aid him in digesting conflicting testimony and preparing appropriate findings. It is only required to exclude from the ranks of such 'competent subordinates' the government's witnesses and attorneys who had 'buried themselves in one side' of an adverse proceeding by testifying, advocating, and preparing one side of a sharply controverted dispute." (Pet. Certiorari, 40-1)

CONCLUSION

It is respectfully submitted that the Petition for Certiorari should be granted.

Dated at Seattle, Washington, October 14, 1949.

Respectfully submitted,

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Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U.S.C. 301 *et seq.*:	
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Miscellaneous:

Attorney General's Manual on the Administrative Procedure Act (1947), p. 50	24
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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 280

WILLAPOINT OYSTERS, INC., PETITIONER

v.

OSCAR R. EWING, ADMINISTRATOR, AND J. DONALD KINGSLEY, ACTING ADMINISTRATOR, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINION BELOW

The opinion (R. Vol. XI, p. 1) of the Court of Appeals is reported at 174 F. 2d 676. The administrative orders under review (R. Vol. II, p. 40 and Vol. IX, p. 1) were published at 13 F. R. 1337, 4663.

JURISDICTION

The judgment of the Court of Appeals was entered April 29, 1949 (R. Vol. XI, p. 33). A petition for rehearing (R. Vol. XII, p. 1) was denied June 3, 1949 (R. Vol. XII, p. 53). The petition for a writ of certiorari was filed August 19, 1949. The jurisdiction of this Court is involved under 28 U. S. C. 1254(1) and Section 701(f)(4) of the Federal Food, Drug, and Cosmetic Act of June 25, 1938, 52 Stat. 1040, 1055, 21 U. S. C. 371(f)(4).

QUESTIONS PRESENTED

1. Whether, in a rule-making proceeding incident to the establishment of a standard of fill of container for canned oysters under the Federal Food, Drug and Cosmetic Act, the hearing examiner's rejection of an offer of proof intended to show that the separation-of-functions requirement of Section 5(c) of the Administrative Procedure Act, 5 U. S. C. 1004(c), had not been observed, denied petitioner means of vindicating a right to a "fair hearing" guaranteed by the due process clause of the Fifth Amendment.

2. Whether the rejection of the offer of proof was contrary to the provisions of the Administrative Procedure Act.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act of 1938, 52 Stat. 1040, 21 U. S. C. 301 et seq., provides:

> SEC. 401. Whenever in the judgment of the Administrator such action will promote hon-

esty and fair dealing in the interest of consumers, he shall promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, and/or reasonable standards of fill of container; * * * [21 U. S. C. 341.]

SEC. 701 * * *

* * * * *

(e) The Administrator, on his own initiative or upon an application of any interested industry or substantial portion thereof stating reasonable grounds therefor, shall hold a public hearing upon a proposal to issue, amend, or repeal any regulation contemplated by any of the following sections of the Act: 401 * * * At the hearing any interested person may be heard in person or by his representative. As soon as practicable after completion of the hearing, the Administrator shall by order make public his action in issuing * * * the regulation * * *. The Administrator shall base his order only on substantial evidence of record at the hearing and shall set forth as part of the order detailed findings of fact on which the order is based. * * *

(f) (1) In a case of actual controversy as to the validity of any order under subsection (e), any person who will be adversely affected by such order if placed in effect may * * * file a petition with the Circuit Court of Appeals of the United States for the circuit wherein such person resides or has his principal place

of business, for a judicial review of such order. * * *

(2) If the petitioner applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, and to be adduced upon the hearing, in such manner and upon such terms and conditions as to the court may seem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original order, with the return of such additional evidence.

(3) The court shall have jurisdiction to affirm the order, or to set it aside in whole or in part, temporarily or permanently. * * * The findings of the Administrator as to the facts, if supported by substantial evidence, shall be conclusive.

[21 U.S.C. 371.]

STATEMENT

This is a special statutory proceeding for judicial review of orders of the Federal Security Administrator which established a definition and standard of identity and a standard of fill of con-

tainer for canned oysters. The orders, which are by nature rule-making in that they establish regulations of general applicability, were promulgated under the authority of Section 401 of the Federal Food, Drug, and Cosmetic Act, *supra*, pp. 2-3.

(1) *Historical background.*—Oysters are canned commercially in three areas of the United States, the South Atlantic coastal area, the Gulf area, and the Pacific Northwest (R. Vol. III, p. 33). The markets for the canned food are primarily in the mid-west and western states (R. Vol. III, pp. 17, 18).

Before 1942, canners of oysters in all areas filled the No. 1 Eastern Oyster can, the can in principal use, to yield a drained or cut-out weight of 5 ounces of oysters. This practice was condoned by an early official expression of the Food and Drug Administration that such a fill would not be considered adulterated on a charge that excessive brine had been substituted in part for oysters (R. Vol. IV, Ex. 3). In 1942 the supply of tin plate became short, and the War Production Board decided that there was wastage of tin plate in oyster canning because of the light 5-ounce fill. Conservation Order M-81 was issued, and it effectively denied tin plate to oyster canners except where No. 1 EO cans were filled to yield at least 7½ ounces of oysters (R. Vol. III, p. 448; Vol. II, p. 42, Finding 1).

Shortly thereafter, the Federal Security Administrator announced that a public hearing would be

held, under the Federal Food, Drug, and Cosmetic Act, upon a proposal to establish a fill of container standard for canned oysters. Public proceedings were held in accordance with law, and on November 18, 1944, the standard was promulgated (R. Vol. IV, Ex. 3). It required a drained weight of not less than 68% of the water capacity of the container (7½ ounces for the No. 1 EO can). The standard was made to apply to canned oysters that averaged less than ½ ounce each, and was largely inapplicable to Pacific oysters because they average more than ½ ounce. Canners of Pacific oysters had discontinued canning in 1942. (R. Vol. I, p. 49, Finding 12.) That order was not challenged.

In the spring of 1946, canning operations began anew on the Pacific coast, and there soon appeared in the same markets in competition canned Pacific oysters in the No. 1 EO can with cut-out weight of approximately 5 ounces and Atlantic and Gulf oysters in the same size can with cut-out weight of 7½ ounces of oysters. The difference in the amounts of oysters in cans was known to wholesale dealers, but was not generally known to retailers or to consumers, with the result that there was likelihood of deception of consumers who would purchase the canned product on the basis of size of container alone without knowledge of the weight differential (R. Vol. II, p. 43, Finding 5). The existing standard gave a decided competitive advantage to canners who were not bound by it and were using the 5-ounce fill.

(2) *The March 10, 1948, order.*—The Federal Security Administrator ordered a public proceeding upon proposals to adopt standards of identity and a standard of fill of container (R. Vol. III, p. 4; Vol. II, p. 118). A public hearing was held in which the Food and Drug Administration and canners of Pacific and Gulf oysters participated (R. Vols. III and IV), a tentative order was published (R. Vol. II, p. 115a), exceptions were filed (R. Vol. II, pp. 84, 86), and petitioner filed a request for postponement and reconsideration of the tentative order (R. Vol. II, p. 52). Petitioner's counsel conferred with Administrator Ewing in order to support his request (R. Vol. II, p. 51). On March 10, 1948, a final order was issued (R. Vol. II, p. 40).

This order contained detailed findings of fact. The findings, reciting first the existing requirements as to fill of container (Findings 1-3), were to the effect that the 7½ ounce fill to which Eastern and Gulf packers had been subject caused minor manufacturing difficulties and some changes in the oysters (Finding 3); that canned Pacific oysters packed to the cut-out weight in use prior to 1942—5 ounces—were not well filled (Finding 4); that sale in the same markets of No. 1 cans of oysters some of which were filled to yield 7½ ounces of meat and some of which were filled to yield only 5 ounces was likely to confuse and deceive consumers who generally did not know of the difference in fill (Finding 5); that in respect of Pacific oysters

there had been no commercial practice of filling cans to capacity and thus no basis of commercial experience on which to determine the maximum fill that could be used without impairment of quality (Finding 6); but that experimental packs made in West Coast canneries both by canners of Pacific oysters and the Food and Drug Administration showed that Pacific oysters could be packed to yield a cut-out weight of at least 6½ ounces from the No. 1 can without significant impairment of the quality of the food (Findings 6-8). (R. Vol. II, pp. 40-45.)

The Administrator concluded that it would not promote honesty and fair dealing in the interest of consumers to return to the 5-ounce fill; that honesty and fair dealing in the interest of consumers would not be promoted by establishing separate standards of fill of container for oysters of different sizes or species; and that a 6½ ounce drained weight from the No. 1 can could be met by all canners with any heat treatment and without impairment of quality.

(3) *The remand and the August 5, 1948, order.*— A petition for judicial review was filed by petitioner alone on May 22, 1948, together with a motion for leave to adduce additional evidence (R. Vol. I, p. 1). Petitioner represented that subsequent to the public hearing it had developed and put into commercial operation an entirely new method of preparing oysters for canning, described as a blanching

method. Petitioner alleged that the record contained no evidence respecting this new method, and asserted that the March 10 order would preclude its use and would destroy petitioner's business.

The Court of Appeals granted the motion on June 8, 1948, ordering the proceeding remanded "with direction to take such additional evidence (and evidence in rebuttal thereof) as may be offered relative to said process of packing blanched oysters, within a period of 30 days from the date of this Order on such reasonable notice to the petitioner as he may give" (R. Vol. V, pp. 40, 42).

The Administrator complied with this mandate (R. Vol. VI and VII). It was at the hearing on the remand that the claimed error upon which petitioner relies was committed. During the cross-examination of a witness for the Food and Drug Administration, he was asked (R. Vol. VI, pp. 960-962) whether he had a hand in preparing, or whether he had written, the March 10 order. The questions were objected to on the ground that the Administrator's decisional process was not a proper subject of interrogation. The hearing examiner ruled that he did not consider the questions pertinent to the issue before him. Shortly thereafter, the witness again was asked whether either he or the attorney appearing on behalf of the Food and Drug Administration contributed a specified sentence to the language of the March 10 order. (R. Vol. VII, pp. 991-992.) Objection was sustained, and petitioner

made an offer of proof as follows (R. Vol. VII, pp. 993-994):

> MR. STEPHAN: I offer to prove by these questions presently addressed to Mr. Callaway and likewise questions yesterday that, in violation of my understanding of the Administrative Procedure Act, Section 5(c), the order in issue of March 10, 1948, violates so much of that section as provides that "save to the extent required for the disposition of ex-parte matters as authorized by law, no such officer (referring to the officers who presided at the hearings) shall consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate, nor shall such officer——"
>
> PRESIDING OFFICER GODING: I hesitate to do this, but I think I am constrained to break in on you. I think what you are reading is entirely irrelevant to these proceedings, because what you are referring to, sir, relates exclusively to quasi-judicial matters; this is a rule making hearing and it is quasi-legislative, and I do not think you are gaining anything by any extended discussion of Section 5 or any part of it.
>
> MR. STEPHAN: I will then accede to the Examiner's statement and preserve an exception as to whether or not the function presently before us falls within the classification indicated.
>
> PRESIDING OFFICER GODING: Very well. Shall we get on now with interrogation?

Petitioner's position was made sufficiently clear by the quoted statement, and no prejudice ensued from the presiding officer's interjection.

At the completion of the hearing, the record was certified to the Acting Administrator,[1] who made findings of fact and conclusions upon the new evidence (R. Vol. IX, pp. i-vii). His findings were: Pacific oysters canned after blanching are no better than those canned after pre-steaming and many persons regard them as inferior because of material suspended in the liquid and because they break more readily (Finding 9). To attain a given drained weight of oysters account must be taken of the changes in the food which occur during preparation for and in canning, the most significant of which is the loss of liquid from the oysters during heat treatment. The total amount of liquid that separates from the oysters is approximately the same whether the oysters are packed in the container raw, are given partial cooking by blanching, or are partly cooked in the shell by pre-steaming (Finding 10). The difference is that with raw oysters the loss occurs in the can whereas with the other methods the loss occurs partly in the can and partly during the pre-canning operations. The blanching loss and the light pre-steaming loss approximates 16% by weight, the pre-steaming loss generally being slightly higher. The put-in weight of oysters, therefore, is not an accurate measure of fill of con-

[1] Administrator Ewing was absent from duty at the time.

tainer and would be only if all oysters were pre-cooked to the same degree before weighing into the cans (Findings 11-14). When a 5 ounce cut-out weight is used for blanched oysters, a put-in weight of approximately 7½ ounces is necessary; and for a 7 ounce cut-out, a put-in of approximately 9½ ounces is required. Thus the lighter drained weight permits a canner to replace 2 ounces of blanched oysters with 2 ounces of water (Finding 12). The liquid drained from canned oysters has food value and flavor, but it is much less valuable than the oyster meat, and the smaller the put-in weight of oysters the greater the water addition to make up the packing medium (Finding 15). The 5 ounce cut-out can is slack-filled. No new equipment and no significant change in canning procedure is required to meet the 6½ ounce fill (Finding 16). Based upon the number of oysters showing defects, there is no real difference between canned oysters filled to yield 5 ounces of drained weight and those filled to yield 6½ ounces, whether they were pre-steamed or blanched prior to canning (Finding 17). Except for slight differences in flavor and appearance, the food value of the liquid packing medium is approximately the same in cans having the same drained weight regardless of the method used in preparing the oysters for canning. As drained weight increases, packing medium decreases, and the flavor and food value of the liquid packing medium is inversely proportional to the amount of water added to make up the packing medium (Finding 18).

The Acting Administrator concluded that there was no basis for prescribing separate standards of fill based upon the method of preparing oysters for canning; that it would not promote honesty and fair dealing in the interest of consumers to base the standard on put-in-weight or the method of preparing oysters for canning; but that it will promote honesty and fair dealing to base the standard of fill of container on drained weight without differentiation as to whether the oysters are canned raw, or are blanched or pre-steamed before canning. The standard prescribed in the March 10 order was not changed. (R. Vol. IX, p. vii.)

(4) *The Court of Appeals decision.*—The court below held that the orders of March 10 and August 3, 1948, were supported by substantial evidence (174 F. 2d at 685-686, 688-689). It disposed of petitioner's claim that the standard of fill was unreasonable as follows (p. 695):

> * * * it is argued that it is unreasonable that a new method of canning oysters which results in a much higher quality product as shown by established and increasing consumer acceptance should be destroyed, purportedly to protect that very consumer. Therein lies much superficial persuasiveness. A short and sufficient answer is that the findings supported by substantial evidence are, in substance, that the higher requirement of fill will not result in impairment of quality when using petitioner's method of canning blanched oysters.

The court found that the record did not support petitioner's claim that Administrator Ewing had not conscientiously considered the evidence. On the contrary, it pointed to letters from Ewing to petitioner's counsel stating that he had "personally" and "thoroughly" considered the record (174 F. 2d at 695), and to the recitations of regularity in the orders (174 F. 2d at 695-696). The court added (p. 696):

> Furthermore, we cannot allow the Administrator's recitation that he has personally examined and considered the evidence in making his decision to be successfully challenged by a mere allegation in a brief. We have neither moral nor legal right to presume that only those who occupy judicial office respect their obligations and perform their official duties honestly, sincerely and conscientiously. Nor can we presume the subordinate personnel to be a camarilla.

The court affirmed the administrative orders insofar as fill of container was concerned and reversed the orders as to standards of identity. (R. Vol. XI, pp. 33-34).[2]

ARGUMENT

Petitioner presents six questions (Pet. 5-7), but they may be consolidated into the two questions stated above, p. 2. In his statement of the case

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[2] Petitioner was granted stays of enforcement of the Administrator's orders pending decision in the Court of Appeals and disposition of the present petition (R. Vol. XII, pp. 55-61).

(Pet. 13-28), counsel for petitioner repeatedly asserts that it has some sort of vested right to continue a 5-ounce fill in the No. 1 can, that it is unreasonable to fix the fill on cut-out weight instead of on put-in weight, that the Administrator improperly classified Pacific oysters with Gulf oysters for purposes of the standard of fill, and that packing blanched Pacific oysters to meet the 6½ ounce requirement of the Administrator's order is impossible and would result in disfiguration of oysters in the form of browning, pressure blemishes, distortion, twisting and breakage. Since these assertions raise questions of judgment which were the concern of the Administrator, and since the court below has found that the order was based upon substantial evidence, petitioner does not argue these points outside its statement of the case and we shall not take them up specifically. While we are willing to rest upon the Court of Appeals' disposition of these contentions, we feel that there are certain undisputed, fundamental, and basic facts to which the attention of this Court should be directed. As shown by petitioner, the can most generally used in the packing of oysters is the No. 1 EO can, which holds 10.94 ounces of water (Pet. 15). Prior to the issuance of Conservation Order No. M-81, the packers followed the practice of canning oysters to yield 5 ounces drained weight of oyster meat. No amount of argument can successfully refute the proposition that, under this practice, the person who buys a can of oysters the contents of which

weigh about 11 ounces actually receives only 5 ounces of oyster meat. The evidence at the hearing disclosed that the cans of blanched oysters commercially packed by petitioner contained more liquid than oysters when opened and weighed (R. Vol. 7, Ex. 33). This is the situation which the order of the Administrator seeks to correct. All it does is to require that the consumer who purchases the 11 ounce can receive 1½ ounces more of oysters and a correspondingly less amount of liquid.[3]

1. Petitioner claims a denial of procedural due process in the hearing examiner's exclusion of questions calculated to show, so it was alleged, that a witness for the Food and Drug Administration either wrote or had a hand in preparing portions of the findings of fact that appeared in the March 10 order (Pet. 28-30).

The proceeding before the Administrator was not quasi-judicial in character. It was part of the rule making process established by the Act. The standards for canned oysters under consideration affected not only petitioner, but all other oyster

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[3] In the *Quaker Oats* case, 318 U.S. 218, 232, this Court pointed out that the legislative history of the Act manifests a congressional purpose to substitute for informative labeling, standards of identity for food sold under a common or usual name, so as to give to consumers who purchase it under that name assurance that they will get what they may reasonably expect to receive. The same design for consumer protection is manifest in the similar provision in the Act providing for a standard of fill of the food container. It recognizes that some method should be provided to correct a constant practice under which the consumer who purchases a container of food fails to receive as much as he has a reasonable right to expect from a container of that size.

canners throughout the United States. This Court, in *Federal Security Administrator* v. *Quaker Oats Company,* 318 U. S. 218, 228, in passing on another food standard issued under sections 401 and 701 of the Act, stated that the "review is of regulations of general application adopted by an administrative agency under its rule-making power in carrying out the policy of a statute with whose enforcement it is charged."

It has long been recognized that the procedural requirements imposed in any given rule-making activity are to be found in the statute which vests authority to issue the regulations. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 303-312. The due process provisions of the Constitution do not require that a hearing be accorded to persons affected by general regulations or legislation. See *Bi-Metallic Investment Co.* v. *State Board, etc.,* 239 U. S. 441; *Bowles, etc.* v. *Willingham et al.,* 321 U. S. 503. Even where notice and public hearing are given, there is no constitutional requirement that an administrative agency make special findings of fact as part of its rule-making process. *Pacific States Box & Basket Co.* v. *White et al.,* 296 U. S. 176.

The Federal Food, Drug, and Cosmetic Act does not preclude consultation between the Administrator and subordinate personnel in food standards proceedings, and the due process clause implies no such prohibition. Since the Constitution requires no hearing at all in rule-making, we find

no basis for the contention that it proscribes the consultation which petitioner attempted to prove.

Petitioner grounds its contention of denial of procedural due process on *Morgan* v. *United States*, 298 U. S. 468, and *Morgan* v. *United States*, 304 U. S. 1, 19-20. These cases were not "ignored" by the Court of Appeals, as petitioner asserts (Pet. 29). The conduct of the administrative proceedings involved here was in accord with the rules announced in those cases. The first *Morgan* opinion includes a statement that the duty of making an order "cannot be performed by one who has not considered evidence or argument," but this Court also said (pp. 481-482):

> This necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department. Assistants may prosecute inquiries. Evidence may be taken by an examiner. Evidence thus taken may be sifted and analyzed by competent subordinates.

In the second *Morgan* case, the Secretary of Agriculture, in answer to the question whether the order represented his independent conclusion, stated that the order "represented my own independent reactions to the findings of the men in the Bureau of Animal Industry" (304 U. S. at 18). This Court said (*ibid.*):

> In the light of this testimony there is no occasion to discuss the extent to which the Secretary examined the evidence, and we agree

with the Government's contention that it was not the function of the court to probe the mental processes of the Secretary in reaching his conclusions if he gave the hearing which the law required. The Secretary read the summary presented by appellants' briefs and he conferred with his subordinates who had sifted and analyzed the evidence. We assume that the Secretary sufficiently understood its purport.

The decision in the second *Morgan* case grew out of the circumstances that no specific complaint had been formulated, there had been no examiner's report, and no proposed findings had been submitted for consideration. This Court held that the essentials of a fair hearing could not be met in such a case if the Secretary accepted and adopted as his own findings which were prepared by the active prosecutors for the Government, after an *ex parte* discussion with them and without according any reasonable opportunity to the respondents to know the claims and to contest them.[4]

In the present case, pursuant to Section 701(e) of the Act, notice of hearing was published in the Federal Register containing a detailed statement of the proposed regulation (Ex. 1, Vol. IV, following p. 701). After the close of the evidence at the

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[4] It was conceded in the second *Morgan* case that attorneys for the prosecution, assisted by witnesses for the prosecution, had prepared the order for the Secretary. But it was not claimed or held that this circumstance voided the order. See 304 U.S. at p. 8.

first hearing in July 1947, a period of 30 days was set for the submission of findings of fact (R. Vol. IV, p. 651). Following the usual practice, the tentative or proposed order issued by the Administrator on October 4, 1947, provided that any interested person could file exceptions within 20 days. On October 27, 1947, an additional period of 30 days for filing exceptions was granted (R. Vol. II, p. 111). Exceptions to the proposed order were filed by petitioner, by the Pacific Coast Oyster Growers Association, and by other packers (R. Vol. II, pp. 52-110). New counsel filed a brief on petitioner's behalf on February 5, 1948, and conferred personally with Administrator Ewing (R. Vol. II, pp. 51, 52). All of these exceptions and proposals were considered by the Administrator (R. Vol. II, p. 46). A final order was issued on March 10, 1948, approximately five months after the issuance of the tentative order. On that day, Mr. Ewing wrote to petitioner's counsel (R. Vol. II, p. 51):

> DEAR HUGH:
>
> I have given careful consideration to your requests for postponing issuance of a final order and for calling another hearing for the purpose of taking additional evidence in the matter of amending the standard of fill of container for canned oysters.
>
> I have personally examined the record of hearing, and I am convinced that the amendment of the standard of fill of container pro-

posed in the tentative order is based on good substantial evidence.

* * *

Sincerely yours,

OSCAR R. EWING,
Administrator.

After the final order was issued, petitioner's present counsel appeared and requested that it be reconsidered (R. Vol. II, p. 2). Mr. Ewing denied this petition (R. Vol. II, p. 1) and advised counsel that his study of the record had satisfied him that the March 10 order was proper in all respects. Thus, the procedural steps observed here clearly take this case outside the rule of the *Morgan* cases.[5]

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[5] The cases cited by petitioner (Pet. 36-39) as in conflict with the decision below are inapposite. In *Powhatan Mining Co.* v. *Ickes*, 118 F. 2d 105 (C.A. 6), coded statistical material was admitted into evidence, but the hearing officer refused to have the data decoded so that the facts could be fully explored on cross-examination. In the case at bar, the petitioner's counsel was allowed every opportunity to cross-examine on material facts. He was stopped only when he undertook to show a violation of Section 5(c) of the Administrative Procedure Act, which, as we show below, is inapplicable in a proceeding of the type involved here. *Berkshire Employees Association* v. *National Labor Relations Board*, 121 F. 2d 235 (C.A. 3), involved possible prejudice on the part of one of the members of the Board. An offer of proof was made to show that the member had attempted through letters to Berkshire's customers to pressure it to cease certain practices which were the subject of inquiry at the hearing. The case was remanded to the Board to hear the evidence. The case at bar involves no charge of bias on the part of either Mr. Kingsley or Mr. Ewing. *Dorsey* v. *Kingsland*, 173 F. 2d 405 (C.A.D.C.), certiorari granted, 337 U.S. 914, No. 53, this Term, involves issues as to the scope of judicial review of a decision disbarring an attorney from practice before the Patent Office. The Federal Food, Drug, and Cosmetic Act clearly makes the substantial evidence rule applicable in this proceeding, and it was properly applied by the court below.

Petitioner also challenges (Pet. 6-7) respondent Kingsley's consideration of the record made at the hearing on the remand. The question is not argued in the petition, and we shall give it only brief consideration. The contention appears to be based upon the certificate Mr. Kingsley signed to authenticate the record of the supplemental hearing, which shows that he considered only the evidence taken at the hearing and not the evidence theretofore reviewed by Mr. Ewing (R. Vol. VI, cover). Petitioner apparently contends that because of the absence of Administrator Ewing, the Acting Administrator could reach a decision on the additional evidence only after having studied the evidence underlying the original order. In this, it relies entirely upon the first *Morgan* case.

It is important to note that the proceedings on the remand were to be conducted within the statutory bounds of Section 701(f)(2), 21 U. S. C. 371(f)(2). It is clear from the statute and the court's order (R. Vol. V, p. 40) that the Administrator was not required to re-hear the entire case. Evidence was to be taken and findings made only upon a narrow issue, i. e., as to the alleged new method of preparing oysters for canning and as to the relationship of such method to a reasonable standard of fill of container. The facts shown by the record are that respondent Kingsley based his supplemental order on the evidence taken at the hearing on the remand and so certified, and that he did in fact refer to the earlier record where necessary to make

comparisons in his findings of fact (R. Vol. IX). The record shows that Mr. Kingsley read the earlier findings and conclusions of Mr. Ewing and that he was thoroughly familiar with the March 10 order. The findings made by Mr. Kingsley did not change any finding previously made; they were supplemental findings which were consistent with the earlier findings of Mr. Ewing. Nothing in the *Morgan* decisions required that the Acting Administrator personally review the matters that had already been decided by Mr. Ewing before making his findings on the new questions interjected by petitioner.

2. Petitioner contends (Pet. 30-34) that it was denied the right to show that the March 10 order was made in violation of the separation of functions requirements of Section 5(c) of the Administrative Procedure Act, 60 Stat. 237, 239; 5 U. S. C. 1004(c), which prohibits officers or employees of an agency from participating or advising in the decision of any case in which they performed investigative or prosecuting functions.

We think it is clear that Section 5(c) is inapplicable to the rule making proceeding involved in this case. Prior to the passage of the Administrative Procedure Act, Congress and a host of legal specialists in the field of administrative law struggled with the task of prescribing an intelligent code of fair administrative procedure in all agency activities. In all of the reports, debates and com-

ments and, most important, in the scheme and context of the law itself, the distinction between rule making and adjudication was made clear. The historical development of the distinction between these two classes of proceedings was recognized and restated. "The Administrative Procedure Act is based upon a broad and logical dichotomy between rule making and adjudication, i.e., between the legislative and judicial functions." *Attorney General's Manual on the Administrative Procedure Act* (1947), p. 50. In the framework of the Act separate sections deal exclusively with rule making and adjudication: section 4 is concerned with "rule making," [6] section 5 deals expressly with "adjudications," [7] and section 7 and 8 fix rules governing hearings and decisions in both classes of proceed-

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[6] Sec. 2(c), 5 U.S.C. 1001(c): "Rule" means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. "Rule making" means agency process for the formulation, amendment, or repeal of a rule.

[7] Sec. 2(d), 5 U.S.C. 1001(d): "Order" means the whole or any part of the final disposition (whether affirmative, negative, injunctive, or declaratory in form) of any agency in any matter other than rule making but including licensing. "Adjudication" means agency process for the formulation of an order.

ings. As specifically stated by the Judiciary Committees of both the Senate and the House of Representatives when reporting the bill which later became the Administrative Procedure Act, it was not intended that rule making should be subject to any provision of Section 5. S. Rep. 752, 79th Cong., 1st sess., p. 18; H. Rep. 1980, 79th Cong., 2d sess., p. 30. See also S. Doc. 248, 79th Cong., 2d sess., pp. 24, 25.

Petitioner argues, however, that Section 5(c) should be applied in a rule-making proceeding that involves sharply controverted factual issues. The Court of Appeals properly disposed of this contention as follows (R. Vol. XI, p. 24; 174 F. 2d 693):

> Cited in support [of this contention] are excerpts from Congressional hearings to the effect that in such a situation, "good practice" would be for the agencies to follow the rule laid down for adjudications. As a matter of policy, such may be true, but the Act as finally enacted did not so provide and we cannot believe that the omission was the result of oversight.[8]

---

[8] The motion of the State of Washington for leave to file a brief as *amicus curiae* and the brief offered in support of the petition here proceed upon the mistaken assumption that the orders entered in the administrative proceeding will adversely affect canned Pacific oysters. Both the Administrator and the court below have found upon substantial evidence that the new standard can be met without quality deterioration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.
ALEXANDER M. CAMPBELL,
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ROBERT S. ERDAHL,
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SEPTEMBER 1949.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1949

No.....

WILLAPOINT OYSTERS, INC., *Petitioner,*

v.

OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION, *Respondents.*

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

August 15, 1949

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State of Washington,

LYLE L. IVERSEN,
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State of Washington,

Attorneys for State of Washington.

Office and Post Office Address: Temple of Justice, Olympia, Wash.

IN THE

SUPREME COURT

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OCTOBER TERM, 1949

No.....

WILLAPOINT OYSTERS, INC., *Petitioner,*

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MOTION FOR LEAVE TO FILE AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

Permission is hereby requested that the undersigned Attorney General of the State of Washington be allowed to file a brief as amicus curiae on behalf of the state pursuant to Rule 27 (9) of the Rules of the Supreme Court of the United States.

SMITH TROY,
Attorney General,
State of Washington,

LYLE L. IVERSEN,
Assistant Attorney General,
State of Washington,

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IN THE

SUPREME COURT

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OCTOBER TERM, 1949

No. .....

WILLAPOINT OYSTERS, INC., *Petitioner,*

v.

OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION, *Respondents.*

MOTION FOR LEAVE TO FILE AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF WASHINGTON AS AMICUS CURIAE

The State of Washington has requested permission to appear as *amicus curiae* in this case because the orders made by the Food and Drug Administrator in this case will seriously and adversely affect an important industry of this state. These orders are unreasonable and discriminate against a product of this state in that the product is rendered relatively unmarketable and elements which have made it attractive to buyers are destroyed. The orders are unlawful, in violation of the Federal Food, Drug and Cosmetic Act of June 25, 1938, c. 675, 52 Stat.

1040 [21 U.S.C.A. (Supp.) 301, et seq.], and of the Administrative Procedure Act of June 11, 1946, c. 324, 60 Stat. 237 [5 U.S.C.A. (Supp.) 1001, et seq.].

The State of Washington adopts the Petition for Writ of Certiorari and Supporting Brief of Petitioner in this case.

STATEMENT OF THE CASE

The canning of oysters in the State of Washington was begun over thirty years ago. (R. Vol. III, 154.) The oysters canned in this state are of a species known as *ostrea gigas* or giant oysters. They were transplanted from the Japanese Coast and acclimated to the waters of the Pacific Coast. The industry extends from Southeastern Alaska into the states of Washington, Oregon and California. (R. Vol. III, 159.)

While not of record in this case, public records of the Land Commissioner of the State of Washington show that the state owns over 10,000 acres of oyster lands now in production, and more than 90,000 acres of suitable and potential oyster lands.

The oyster industry is large and growing in this state. Revenues of the state from this source over a 44 year period, 1901 to 1945, amounted to $187,688, or an average of approximately $4400 per year, but during the past four years, through 1948, the state's revenues from oyster collections aggregated $290,770, or an average in excess of $72,000 per year.

Commencing in 1949, the state will also earn substantial tax revenues from the oyster industry.

It will be seen from the foregoing that the welfare of the oyster industry is of considerable importance to the State of Washington. Appendix A attached hereto, official data compiled from the Pacific Fisherman, shows the impressive growth of the industry. The business of propagating seed oysters within the area has likewise grown substantially. (R. Vol. III, 159-60.)

The demand for these oysters has increased by leaps and bounds. (R. Vol. III, 161.) These large oysters mature in about three years. Canned to a net cut-out weight of five ounces, there is a ready customer demand for them. This has been the standard pack in the oyster industry of this area and it is now a basic factor in the economic phase of the oyster industry on the Pacific Coast. (R. Vol. III, 157.)

West Coast oysters differ sharply from Southern oysters both as to zoological species and processing. (R. Vol. III, 161.) Western oysters have nutritional value recognized by medical science as favorable to persons suffering from anemia or in run down physical condition. According to the testimony of the Chairman of the Department of Zoology of the University of Washington these Western oysters stand next to liver as the best food material available for the cure of anemia and even pernicious anemia. (R. Vol. III, 166.)

Qualified food experts testify to the high food value content of the Western oyster when processed and canned by light steaming or blanching so as to retain the lymph fluid, iron and copper, and glycogen, which are of high nutritive value. (R. Vol. III, 165, 166-168.) Excessive heating would deteriorate the oyster from the standpoint of quality and cause excessive shrinkage. (R. Vol. III, 170-1.) The very elements which have created the customer demand for the oysters produced in this area and have made them a superior product, will be to a large measure destroyed by steaming necessary to pack them in the manner required by the orders.

Witnesses for the Food and Drug Administration seem to disregard the comparative food values of Western

oysters and to be concerned only with drained weight content rather than food content in attempting to gain a parity with Southern oysters through requiring an equality of weight. Apparently no regard was had to the fact that such a pack would require excessive steaming seriously detrimental to the healthful characteristics, satisfying taste, and pleasing appearance and shape, which have made canned Western oysters the superior product that they are.

ARGUMENT

The State of Washington has not appeared as a party to these proceedings. Its interest, however, in this case is considerable, both from the standpoint of protecting the interests of its citizens engaged in an important industry and from its own standpoint as the owner of large tracts of producing or potential oyster lands, and as the recipient of tax revenues from this industry. Briefs of both petitioner and respondent before the Court of Appeals, the opinion of the Court of Appeals, and the Petition for Certiorari and Supporting Brief filed by petitioner have been studied by the undersigned attorneys, and they concur in the contentions of petitioner that unfair procedural methods adopted by the respondents resulted in the unlawful orders complained of, and that those procedural methods were violative of the decisions of this Court in the first Morgan case, *Morgan v. United States,* 298 U. S. 468, 80 L. Ed. 1288 (1936), and the second Morgan case, *Morgan v. United States,* 304 U. S. 1, 82 L. ed. 1129 (1938), and that the portion of the two final orders which fixed an identical standard of fill was not in accordance with law because: (a) it was made without observance of procedure required by law; (b) it was not supported by substantial and lawful evidence; (c) it was unreasonable and in excess of statutory jurisdiction; (d) it was arbitrary, capricious and an abuse of discretion; (e) it was contrary to constitutional rights.

CONCLUSION

Certiorari should be granted to review the final opinion and decree of the Court of Appeals, and, on review, the two final orders fixing identical standards of fill should be permanently enjoined because made in a manner that was not in accordance with law, and the matter should be remanded to the Administrator for further proceedings.

Respectfully submitted,

SMITH TROY,
Attorney General,
State of Washington,

LYLE L. IVERSEN,
Assistant Attorney General,
State of Washington,

Attorneys for State of Washington.

APPENDIX A

The PACIFIC FISHERMAN, 1949 Yearbook Number, January 25, 1949 (Miller Freeman Publications), pp. 285, 287, shows the growth and importance of the Canned Oyster industry to the Pacific Coast in the two following tables:

PACIFIC CANNED OYSTERS
Season of 1947-48

Company	Cannery Location	Cases No. 1, E. O. (4 Doz.)	Cases Other Sizes	Total Standard Cases 48, No. 1, E. O.
Bendiksen, E. H.	South Bend, Wash.	28,661	.....	28,661
Davis Co., W. E.	Aberdeen	1,500	.....	1,500
Northern Oyster Co.	Oysterville	1,050	100	1,210
Wiegardt Bros.	Ocean Park	15,658	709	16,888
Willapoint Oysters, Inc.	South Bend	54,000	.....	54,000
Total 1947-48 Season.	.....	100,869	809	102,259

Pacific Canned Oysters Packed in—

1947	57,316	1942	72,315	1936	118,853
1946	89,050	1941	178,445	1935	88,062
1945	3,184	1940	148,870	1934	68,325
1944	none	1939	112,540	1933	32,315
1943	583	1938	111,348	1932	12,233
		1937	130,872	1931	7,900

NOTE:—Packs of smoked oysters are not included in the totals in the column showing packs in standard cases. This total column is concerned only with steam-canned oysters.

Figures prior to 1948 are from the U. S. Fish and Wildlife Service, compiled on a calendar year basis.

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No. 280

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CHARLES ELMORE

In the

Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC.
Petitioner,

vs.

OSCAR R. EWING, Administrator, and
J. DONALD KINGSLEY, Acting Administrator,
FEDERAL SECURITY AGENCY, FOOD and DRUG
ADMINISTRATION,
Respondents.

MOTION FOR LEAVE TO DISPENSE WITH PRINTING OF THE RECORD IN APPLYING FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, NINTH CIRCUIT

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Dated at Seattle, Washington, June 30, 1949.

THE ARGUS PRESS, SEATTLE

No. .....

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No. .....

MOTION FOR LEAVE TO DISPENSE WITH PRINTING OF THE RECORD IN APPLYING FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Asociate Justices of the Supreme Court of the United States:

Comes now your Petitioner, Willapoint Oysters, Inc., and moves this Honorable Court for leave to dispense with printing of the record and in lieu thereof to proceed on clearly legible copies of the duplicate original typed record in form as requested by Praecipe to be transmitted to the Clerk of this Honorable Court by the Clerk of the Court of Appeals for the Ninth Circuit, and in support thereof respectfully shows:

1. Petitioner, Willapoint Oysters, Inc., has served and filed its Praecipe for Transcript of the Record

herein, requesting the Clerk of the Court of Appeals for the Ninth Circuit to certify for filing with the Clerk of this Court the duplicate original and three copies of the typewritten (duplicator, mimeographed and typed) record on which this matter was heard and determined therein, for use on Petition for Writ of Certiorari now being prepared, and to be printed, served and filed seasonally within the next 30 days, on or before August 2, 1949.

2. Petitioner commenced this proceeding by filing in the Court of Appeals for the Ninth Circuit a petition for judicial review and for further relief under §701(f) of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040, 1055-6; 21 USCA §371, to review two certain final orders of the Administrator, and of the Acting Administrator, Federal Security Agency, Food and Drug Administration.

3. Pursuant to §701(f) (1) of that Act, after said petition was filed and served, the respondent Administrator certified and filed in the Court of Appeals a duplicate original of the transcript of the proceedings and record on which his first final order was based. The transcript which he certified to the Court of Appeals was a true copy made on an original "spirit duplicator" or "ditto" machine.

4. In order to conserve both time and expense (then estimated at approximately ONE THOUSAND FIVE HUNDRED ($1500.00) DOLLARS), Petitioner moved in the Court of Appeals for an order permitting it to proceed upon additional duplicate originals of said transcript which it agreed to purchase and furnish

promptly. Petitioner showed that such transcripts in form as certified by the Administrator were clear and legible, and offered to furnish additional duplicates of the transcript of testimony, and (by positive photostatic process, restoring the normal condition of clear black print on white paper) to purchase and furnish like additional copies of the voluminous original exhibits, many of which are of a detailed statistical nature and expensive and time-consuming to print. Counsel for respondents assented to said motion. Petitioner invoked the Court's discretion to grant its motion under the *Federal Rules of Civil Procedure*, 28 USCA, foll. §723c, Rule 75, *Notes of Advisory Committee of Rules*, Note to Sub-division (1), p. 760 at 761.

5. The Court of Appeals, by its order dated June 7, 1949, granted Petitioner's motion, as follows:

> "IT IS ORDERED that said motion be, and hereby is granted, and that petitioner be, and it is hereby granted leave to present the petition for review on a typewritten transcript of record; *four clear legible copies* of the transcript as designated by counsel for (the) respective parties under Rule 19, to be filed with the clerk of this court within forty days after the Administrator, Federal Security Agency, has disposed of this cause on its remand for the hearing of additional evidence; one copy of such transcript to be served upon counsel for respondent; the transcripts to be typed on letter size paper 8 x 10½", or reporter's transcript paper, and *bound on the left margin as a book.*"[1]

---

[1]Emphasis supplied herein, unless otherwise noted.

6. As indicated in said order of June 7, 1949, the Court of Appeals, after oral argument on motion for temporary injunction, and responsive to an alternate prayer of petitioner, also issued a separate order of even date, which remanded the controversy to respondent Administrator to take additional evidence prior to full judicial review by said Court on the merits.

7. Thereafter, on remand, the respondent *Acting* Administrator took additional evidence and he issued a "second final order," which he likewise certified and filed in the Court of Appeals together with duplicate original or "ditto" transcript of said further proceedings and record on which his second final order was based.

8. Petitioner promptly complied with permission granted by the Court's order of June 7, 1949, and prepared, served and filed four clearly legible duplicate-original copies of the original and supplemental transcripts of proceedings, exhibits and record before the Administrator and the Acting Administrator, respectively; each bound on the left margin as a book. Similarly, four copies of all pertinent pleadings were served and filed in the Court of Appeals. Each is clearly legible and well-typed or mimeographed, and each is similarly stapled on the left margin as a book.

9. Prior to final argument, briefs were filed in printed form, pursuant to the Rules, and will be similarly so prepared on the Petition for Writ of Certiorari and subsequent proceedings.

10. On April 29, 1949, the Court of Appeals entered

its final opinion and decree, and on June 3, 1949, said Court denied a Petition for Rehearing. The Decree set aside in part and enforced in part, in accordance with the opinion, the Administrator's and Acting Administrator's orders.

11. It will be necessary for this Court to consider portions of so much of the entire record as Petitioner has designated in its Praecipe in determining whether to grant Petitioner's prayer for a Writ of Certiorari, and thereafter in reviewing the opinion and decree of the Court of Appeals.

12. The Clerk of the Court of Appeals now estimates that if printing were required at this stage of the proceedings, such printing would cost approximately FIVE THOUSAND THREE HUNDRED ($5,300.00) DOLLARS. The transcript comprises 1178 pages of record and more than 200 pages of exhibits, plus the pleadings.

13. Petitioner concurs with respondents in the desire for an early settlement of this controversy. It believes its petition for a Writ of Certiorari is well founded. The decision of the Court of Appeals was partially favorable to it and partially adverse. Determination on the present record will expedite a decision. In a very recent and not dissimilar situation in *Matter of Electric Power & Light Corporation*, ... U.S. ....., 69 S.Ct. 917 (adv. sh.) decided May 16, 1949, the separate opinion of Mr. Justice Frankfurter noted that appeal below was expedited by setting for argument on the merits on a "typewritten record and briefs."

14. In order to avoid any possible intervening delay, this motion for leave to dispense with printing of the record is being submitted by petitioner prior to its Petition for Writ of Certiorari, and well within the 60-day stay period which the Court of Appeals has allowed Petitioner to submit its petition for Writ of Certiorari. Counsel for petitioner is meanwhile completing said petition for Writ of Certiorari and plans to print, serve and file 40 printed copies thereof in conformance with this Court's rules.

15. While printing of the record at this stage would entail very great further expense to Petitioner and some further delay, nevertheless, if this Court should so direct as a condition precedent to its consideration of Petitioner's printed petition for Writ of Certiorari, shortly to be filed, Petitioner will, notwithstanding said heavy burden, promptly undertake such printing.

16. But if this Court should grant the instant motion to dispense with printing, and thereafter in granting certiorari should provide that prior to argument, the record or portions directed by it be printed for the Court's convenience, Petitioner likewise will undertake promptly to print such portions as this Court may direct.

WHEREFORE, Petitioner moves this Honorable Court for an order to dispense with printing of the record in considering its Petition for a Writ of Certiorari, and, if granted, in reviewing said opinion and decree of the Court of Appeals; and that this Honorable Court consider the same upon the duplicate originals of the record, and the three additional copies thereof, in bound volumes, paged consecutively, and appropri-

ately indexed, which the Clerk of the Court of Appeals has been requested by Praecipe to prepare at petitioner's expense and to be transmitted to the Clerk of the United States Supreme Court.

Dated at Seattle, Washington, June 30, 1949.

Respectfully submitted,

ALBERT E. STEPHAN,
Counsel for Petitioner, Willapoint Oysters, Inc.

GROSSCUP, AMBLER & STEPHAN,
711 Central Building,
Seattle 4, Washington.
Of Counsel.

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CHARLES ELMORE

No. 280

In the Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC., PETITIONER

vs.

OSCAR R. EWING, Administrator, and
J. DONALD KINGSLEY, Acting Administrator,
FEDERAL SECURITY AGENCY, FOOD and DRUG
ADMINISTRATION, RESPONDENTS.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

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Seattle 4, Washington,
Of Counsel.

Dated at Seattle, Washington, March 30, 1950.

THE ARGUS PRESS, SEATTLE

No. 280

In the Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC., PETITIONER

vs.

OSCAR R. EWING, Administrator, and
J. DONALD KINGSLEY, Acting Administrator,
FEDERAL SECURITY AGENCY, FOOD and DRUG
ADMINISTRATION, RESPONDENTS.

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

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Of Counsel.

Dated at Seattle, Washington, March 30, 1950.

THE ARGUS PRESS, SEATTLE

In the Supreme Court of the United States

OCTOBER TERM, 1949

WILLAPOINT OYSTERS, INC., *Petitioner*, vs. OSCAR R. EWING, Administrator, and J. DONALD KINGSLEY, Acting Administrator, FEDERAL SECURITY AGENCY, FOOD AND DRUG ADMINISTRATION, *Respondents.*	No. 280

MOTION FOR LEAVE TO FILE PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

Comes now your Petitioner, Willapoint Oysters, Inc., and moves this Honorable Court for leave to file a Petition for Rehearing of its Petition for Writ of Certiorari to the Court of Appeals, Ninth Circuit, and in support thereof respectfully shows:

1. On August 19, 1949, Petitioner filed its Petition for Writ of Certiorari and Supporting Brief. Respondents filed a Brief in Opposition on October 4, 1949. Petitioner filed its Reply on October 14, 1949. Petitioner had previously also filed a Motion to Dispense with Printing of Record.

2. On October 24, 1949, this Honorable Court entered its order as follows:

> "The motion to dispense with printing the record is granted. The petition for writ of certiorari is denied. Mr. Justice Douglas took no part in the consideration or decision of these applications."

3. On February 20, 1950, this Honorable Court delivered its opinion and judgment in No. 154, *Wong Yang Sung v. J. Howard McGrath, Attorney General of the United States and Watson V. Miller, United States Commissioner of Immigration and Naturalization.* Said opinion by Mr. Justice Jackson was 6 to 1, Mr. Justice Reed, dissenting; and Mr. Justices Douglas and Clark not participating. 70 S. Ct. 445.

4. Said opinion in *Wong Yang Sung v. McGrath* goes to the heart of the problem of administrative fairness and procedural due process, and holds that on the facts there in issue it was unlawful to embody:

> "in one person or agency the duties of prosecutor and judge." (70 S. Ct. 450)

5. While the facts necessarily differ, it is believed that the principle so clearly enunciated in *Wong Yang Sung v. McGrath* is highly relevant and controlling of the issues raised by petitioner's original Petition for Certiorari. For this reason leave to file its Petition for Rehearing and Supporting Brief is now respectfully requested.

6. The lower court opinions in this case, now reversed by the Supreme Court, did not disclose the parallels in these two cases. 80 F.S. 235, 174 F.2d 158. Therefore the *Wong Yang Sung* case in the lower courts and its pendency here on certiorari were not referred to in the original Petition for Certiorari; nor could a well founded Petition for Rehearing be filed until after this Court's decision in that case on February 20, 1950.

7. Petitioner was originally granted injunctive relief against the allegedly unlawful orders of the Food and Drug Administration on the basis of irreparable damage. This was heretofore granted by the Court of Appeals for the Ninth Circuit, and extended until it was dissolved as

a result of this Honorable Court's original denial of the Petition for Certiorari.

8. Petitioner has previously shown that compliance requires it to impair the quality of pack of its food product. If this Court should grant certiorari, petitioner prays that such injunctive relief be restored pending this Court's final opinion.

9. If this request to restore injunctive relief should be denied, but certiorari granted, petitioner then prays such relief be restored if and when petitioner prevails in a final opinion of this Court.

10. Petitioner's counsel certifies that the Petition for Rehearing is filed in good faith and not for delay.

WHEREFORE Petitioner moves this Honorable Court for leave to file its Petition for Rehearing of its Petition for Certiorari.

Dated at Seattle, Washington, March 30, 1950.

Respectfully submitted,

ALBERT E. STEPHAN,
Counsel for Petitioner,
Willapoint Oysters, Inc.

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Seattle 4, Washington,
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